by an administrator, executor, or other legal representative." N.C.G.S. § 130A-422(1). This rule prevents a statutory gap if § 28A-18-1 was the only way to pursue the claim. Notably, a vaccine-related death is one explicit trigger to the cause of action under the statute. N.C.G.S. § 130A-423(b1) (stating a claimant must first file a civil suit for damages arising from vaccine related injury or death). Therefore, without § 130A-422(1), children whose death was vaccine related would have no remedy because the cause of action would not have accrued during their lifetime and § 28A-18-1 would be inapplicable. As death itself can create the cause of action, survival rules beyond § 28A-18-1 are necessary under the statute to ensure relief in cases where other survival statutes would not be helpful. Far from surplusage, the additional language in § 130A-422(1) was required – death was explicitly contemplated by the Vaccine Program framework, so the additional language was necessary to ensure there was no gap in the statutory framework whereby children who suffer non-fatal vaccine-related injuries have a cause of action while those who die a vaccine-related death do not.

The Eugenics Program further refutes the State's surplusage argument. The Eugenics Program provided that "any payment shall be made to the estate of the decedent" for claimants who die "during the pendency of a claim, or after being determined to be a qualified recipient[.]" N.C.G.S. § 143B-426.51(b) (expired June 30, 2015). Again, the Eugenics Program is undoubtedly distinct from § 148-82 *et seq.* The Eugenics Program was a two-year, time-limited program whereby individuals alive on June 30, 2013 who were forcibly sterilized under the North Carolina Eugenics Board Program could petition for compensation. *See* §§ 143B-426.50(1), 143B-426.51(a) (collectively providing the program was to run from June 30, 2013 to June 30, 2015). The first payment was approximately a $20,000 lump sum and the second payment was for $10

million divided by the total number of recipients.[3] The vast majority of those forcibly sterilized under the Eugenics Program were sterilized prior to July 1960, so the victims still alive on June 30, 2013 – at least 53 years later – were necessarily exclusively elderly individuals.[4] And the Eugenics Program provided a fixed two-year window in which victims were permitted to bring claims. This context, noticeably absent from the State's briefing, explains *why* the legislature had reason to believe that at least some claimants would likely die during the pendency of their claims. Therefore, it was prudent to include a survival provision to streamline claims under a time-limited program – circumstances not shared by § 148-82 *et seq*.

The legislature enacting § 148-82 *et seq*. simply had no reason to have considered the likelihood of death because, unlike the Eugenics Program, they did not anticipate a significant volume – or potentially any – instances where death would complicate claims under this statutory scheme. In fact, to date, § 148-82 *et seq*. has rarely needed to rely on a survival mechanism. The State has granted a Pardon of Innocence to 34 individuals, including Mr. Finch, and only four – the four members of the Wilmington Ten referenced in *Jacobs* — have been pardoned posthumously.[5] Excluding Mr. Finch, the average age of a living North Carolina exoneree when receiving a Pardon

[3] The second payment came out to roughly $15,000 per qualified recipient. Press Release, *Senate Passes Bipartisan Bill to Assist Eugenics Victims Receiving Compensation Payments*, Thom Tillis (Dec. 1, 2015), https://www.tillis.senate.gov/2015/12/senate-passes-bipartisan-bill-to-assist-eugenics-victims-receiving-compensation-payments.

[4] Approximately 5,521 of an estimated 7,528 people forcibly sterilized under the state's Eugenics Program were sterilized prior to July 1960. *See* Governor's Task Force, *The Governor's Task Force to Determine the Method of Compensation for Victims of North Carolina's Eugenics Board: Final Report to the Governor of North Carolina*, at 6 (Jan. 27, 2012), https://web.archive.org/web/20120314083006/http://www.sterilizationvictims.nc.gov/documents/FinalReport-GovernorsEugenicsCompensationTaskForce.pdf.

[5] *See* The National Registry of Exonerations, *North Carolina Exonerees*, University of California-Irvine Newkirk Center for Science & Society, University of Michigan Law School, and Michigan State University College of Law (Last accessed August 2, 2022) (showing all North Carolina exonerees and providing biographical and Pardon information for each), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=ST&FilterValue1=NC.

of Innocence is 48 years old.[6] So, unlike in the Eugenics Program, there was no reason for the legislature to believe large numbers of pardon recipients would die before their § 148-82 *et seq.* claims could be adjudicated. In practice, only four posthumous pardons have been issued, and likely only because the decedents were pardoned as part of a larger group that included six living members. Of course, Mr. Finch is the only North Carolina pardon recipient to be pardoned *inter vivos* and die between his pardon and the adjudication of his § 148-82 *et seq.* claim.[7]

Simply put: Mr. Finch is an outlier. Section 28A-18-1 is a catch-all survival statute designed for such an outlier. The legislature surely considered the catch-all statute when deliberately drafting §148-82 *et seq.* without a specific survival statute; concluding that the catch-all would cover the unlikely scenario that a claimant die with a pending claim. The State attempts to improperly impute the very opposite legislative intent onto § 148-82 *et seq.* by comparing it to incomparable compensation programs. Its other cited programs had uniquely justifiable reasons to include survival provisions under the almost certain reality that some of the claimants under those programs would die before pursuing their claims. But that rationale is completely inapplicable to §148-82 *et seq.* because of the relative unlikelihood of death. Thus, when interpreting § 148-82 *et seq.*, using § 28A-18-1 as a survival mechanism is not surplusage. Indeed, the survival statute exists for just such a scenario: providing that claims which accrued prior to death survive to the decedent's estate when the relevant statute is silent on the matter.

[6] *Id.*
[7] *Id.*

## CONCLUSION

For the reasons advanced in the Estate's Brief and because the State's Response Brief fails to support a contrary conclusion, this Commission should find that Mr. Finch's estate may collect his § 148-82 *et seq.* award pursuant to § 28-18-1(a).

## Applicant Details

| | |
|---|---|
| First Name | **Noah** |
| Last Name | **Kostick** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **Nkostick33@law.gwu.edu** |
| Address | **Address**<br>**Street**<br>**1800 N Lynn St Apt #1405**<br>**City**<br>**Arlington**<br>**State/Territory**<br>**Virginia**<br>**Zip**<br>**22209**<br>**Country**<br>**United States** |
| Contact Phone Number | **9048814648** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Baldwin-Wallace College** |
| Date of BA/BS | **May 2021** |
| JD/LLB From | **The George Washington University Law School**<br>**https://www.law.gwu.edu/** |
| Date of JD/LLB | **May 19, 2024** |
| Class Rank | **20%** |
| Law Review/Journal | **Yes** |
| Journal(s) | **International Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **First Year Moot Court Competition** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |

| | |
|---|---|
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Trangsrud, Roger
rtrang@law.gwu.edu
(703) 534-3119
Lerner, Carolyn
Lerner_Chambers@cfc.uscourts.gov
Grillot, Ben
bgrillot@law.gwu.edu
2023203872

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

# NOAH KOSTICK

Nkostick33@law.gwu.edu ▪ 904.881.4648 ▪ 1800 N Lynn St Apt #1405 Arlington, VA 22209

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024–2025 term. I am currently an editor on The George Washington International Law Review and research complex litigation for Professor Roger Trangsrud. In the fall of 2022, I externed for Judge Carolyn N. Lerner where I researched and wrote memoranda, drafted orders, and helped edit opinions. That experience inspired me to pursue a judicial clerkship.

I am particularly interested in your chambers because I currently live in Virginia. Enclosed is my resume, law school transcript, and writing sample. I have also requested recommendations from Judge Carolyn N. Lerner, Professor Roger Trangsrud, and Professor Ben Grillot.

Respectfully,

Noah Kostick

# NOAH KOSTICK

Nkostick33@law.gwu.edu ▪ 904.881.4648 ▪ 1800 N Lynn St Apt #1405 Arlington, VA 22209

## EDUCATION

**The George Washington University Law School** — **Washington, DC**
GPA: 3.648 Thurgood Marshall Scholar (Top 35% of class, as of Spring 2023) — J.D. Expected May 2024
Activities: Writing Fellow, George Washington International Law Review

**Baldwin Wallace University** — **Berea, OH**
Bachelor of Arts, *cum laude*, in Business Administration and Industrial & Organizational Psychology — May 2021
Leadership: Senior Class President, Alpha Sigma Phi President, Rotaract Vice President, Interfraternity Council Co-Director of Development, Junior Class President, Sophomore Class Treasurer, Radcliffe Leadership Fellow

## PROFESSIONAL EXPERIENCE

**MANATT, PHELPS & PHILLIPS, LLP** — **Washington, DC**
*Incoming Summer Associate* — Summer 2023

**PROFESSOR ROGER TRANGSRUD** — **Washington, DC**
*Graduate Research Assistant* — September 2022 – Current

- Completed various research assignments regarding the MDL panel, divisive mergers in bankruptcy ("Texas Two-Step"), third-party litigation financing, judicial review of inventory settlements, and mass arbitrations
- Assisted in planning conferences on complex litigation, bankruptcy, and the MDL panel for federal judges and leading plaintiffs and defense attorneys

**THE HONORABLE CAROLYN N. LERNER, U.S. COURT OF FEDERAL CLAIMS** — **Washington, DC**
*Fall Extern* — September 2022 – November 2022

- Synthesized relevant law on a motion for reconsideration involving a *qui tam* realtor suit
- Researched and drafted memorandum on Special Masters' use of the *Daubert* factors to determine the credibility of expert testimony for a Vaccine Act appeal
- Summarized the factual background in a military pay appeal involving a retired fighter pilot
- Participated in table reads, provided citation and substantiation checks, and performed other clerk-like duties as assigned

**POTOMAC LEGAL GROUP** — **Washington, DC**
*Law Clerk* — May 2022 – August 2022

- Drafted a settlement negotiations response to opposing counsel detailing weaknesses in the opposing parties case law regarding the interactive requirement mandated by the ADA in a failure to accommodate claim
- Researched state and federal discrimination laws to write several memorandums for cases in federal court, state court, an EEOC mediation, and an arbitration
- Wrote memorandums analyzing the strengths of breach of contract and unpaid wages claims in D.C. and Virginia
- Collaborated with other law clerks to write a memorandum on the discriminatory effect of artificial intelligence in recruitment, hiring, and promotion of employees
- Drafted the initial discovery disclosure for a case before the U.S. District Court for the District of Columbia
- Assisted in preparing a client for an EEOC mediation, including drafting counsel's opening statement

**NATIONAL SAFETY APPAREL** — **Cleveland, OH**
*Human Resource Intern* — May 2021 – August 2021

- Reviewed Illinois marijuana laws and recommended changes to the Chicago office's drug testing policy
- Created a background check policy and interviewed potential background check companies
- Researched best practices and designed a calendar policy to assist in a new hybrid work schedule
- Reviewed supplier contracts for the acquisition of a new glove brand

## INTERESTS

Ice hockey (played in the EHL for the NY Apple Core after high school), golf, tennis, and chess

# THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G36772370
Date of Birth: 10-JUN

Date Issued: 07-JUN-2023

Record of: Noah Kostick

Page: 1

Student Level: Law
Admit Term: Fall 2021

Issued To: NOAH KOSTICK
NKOSTICK33@LAW.GWU.EDU

REFNUM:5853261

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

| SUBJ NO | COURSE TITLE | CRDT | GRD PTS |
|---|---|---|---|
| **Fall 2021** | | | |
| Law School | | | |
| Law | | | |
| LAW 6202 | Contracts<br>Morant | 4.00 | A |
| LAW 6206 | Torts<br>Suter | 4.00 | A |
| LAW 6212 | Civil Procedure<br>Trangsrud | 4.00 | A |
| LAW 6216 | Fundamentals Of Lawyering I<br>Grillot | 3.00 | A- |
| Ehrs 15.00 GPA-Hrs 15.00 GPA 3.933 | | | |
| CUM 15.00 GPA-Hrs 15.00 GPA 3.933 | | | |
| GEORGE WASHINGTON SCHOLAR | | | |
| TOP 1% - 15% OF THE CLASS TO DATE | | | |
| **Spring 2022** | | | |
| Law School | | | |
| Law | | | |
| LAW 6208 | Property<br>Roberts | 4.00 | A- |
| LAW 6209 | Legislation And Regulation<br>Smith | 3.00 | B |
| LAW 6210 | Criminal Law<br>Cottrol | 3.00 | B+ |
| LAW 6214 | Constitutional Law I<br>Fontana | 3.00 | B+ |
| LAW 6217 | Fundamentals Of Lawyering II<br>Grillot | 3.00 | A- |
| Ehrs 16.00 GPA-Hrs 16.00 GPA 3.417 | | | |
| CUM 31.00 GPA-Hrs 31.00 GPA 3.667 | | | |
| Good Standing | | | |
| GEORGE WASHINGTON SCHOLAR | | | |
| TOP 1% - 15% OF THE CLASS TO DATE | | | |

********** CONTINUED ON NEXT COLUMN **********

| SUBJ NO | COURSE TITLE | CRDT | GRD PTS |
|---|---|---|---|
| **Fall 2022** | | | |
| Law School | | | |
| Law | | | |
| LAW 6380 | Constitutional Law II<br>Fontana | 3.00 | A |
| LAW 6400 | Administrative Law<br>Glicksman | 3.00 | A- |
| LAW 6666 | Research And Writing<br>Fellow<br>Blinkova | 2.00 | CR |
| LAW 6668 | Field Placement<br>Mccoy | 1.00 | CR |
| LAW 6669 | Judicial Lawyering<br>Iscoe | 2.00 | B+ |
| LAW 6683 | College Of Trial Advocacy<br>Saltzburg | 3.00 | A |
| Ehrs 14.00 GPA-Hrs 11.00 GPA 3.788 | | | |
| CUM 45.00 GPA-Hrs 42.00 GPA 3.698 | | | |
| Good Standing | | | |
| GEORGE WASHINGTON SCHOLAR | | | |
| TOP 1% - 15% OF THE CLASS TO DATE | | | |
| **Spring 2023** | | | |
| LAW 6230 | Evidence | 4.00 | A- |
| LAW 6236 | Complex Litigation | 3.00 | B+ |
| LAW 6360 | Criminal Procedure | 4.00 | B+ |
| LAW 6666 | Research And Writing<br>Fellow | 2.00 | CR |
| Ehrs 13.00 GPA-Hrs 11.00 GPA 3.455 | | | |
| CUM 58.00 GPA-Hrs 53.00 GPA 3.648 | | | |
| Good Standing | | | |
| THURGOOD MARSHALL SCHOLAR | | | |
| TOP 16% - 35% OF THE CLASS TO DATE | | | |
| **Fall 2022** | | | |
| Law School | | | |
| Law | | | |
| LAW 6657 | Int'L Law Review Note | 1.00 | ---------- |
| | Credits In Progress: | 1.00 | |
| **Spring 2023** | | | |
| LAW 6657 | Int'L Law Review Note | 1.00 | ---------- |
| | Credits In Progress: | 1.00 | |

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G36772370
Date of Birth: 10-JUN

Date Issued: 07-JUN-2023

Record of: Noah Kostick

Page: 2

| SUBJ NO | COURSE TITLE | CRDT | GRD PTS |
|---|---|---|---|
| Fall 2023 | | | |
| LAW 6218 | Prof Responsibility & Ethics | 2.00 | ---------- |
| LAW 6250 | Corporations | 4.00 | ---------- |
| LAW 6351 | Reading Group | 1.00 | ---------- |
| LAW 6387 | Voting Rights | 2.00 | ---------- |
| LAW 6393 | First Amendment - Religion | 3.00 | ---------- |
| LAW 6644 | Moot Court - Van Vleck | 1.00 | ---------- |
| LAW 6659 | International Law Review | 1.00 | ---------- |
| | Credits In Progress: | 14.00 | |

********** TRANSCRIPT TOTALS **********

| | Earned Hrs | GPA Hrs | Points | GPA |
|---|---|---|---|---|
| TOTAL INSTITUTION | 58.00 | 53.00 | 193.33 | 3.648 |
| OVERALL | 58.00 | 53.00 | 193.33 | 3.648 |

########## END OF DOCUMENT ##########

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Noah Kostick as an outstanding candidate for a clerkship with your Honor.

Noah was my student in a small section of Civil Procedure in the Fall of 2021 and is a student this semester in my Complex Litigation class. He has consistently impressed me as someone who is exceptionally well prepared and someone who could always be counted on to give thoughtful and insightful responses to challenging questions. I thus was not surprised when he earned one of the top grades I awarded in Civil Procedure. His academic record to date at GW is one of the strongest I have ever seen with A's in the majority of courses he has taken. Noah must rank near the top of his class as is reflected in his standing as a George Washington Scholar.

When the time came for me to hire a research assistant last fall, I was thrilled that Noah applied and my decision to hire him was one of the easiest I have ever had. As my research assistant I have had the opportunity to work with him closely on a wide range of issues in complex litigation such as whether transferee judges in MDL litigation have and should have the power to review aggregate settlements for fairness and conflicts of interest. Judges have such authority in class actions, but it is not clear they do or should have such powers in mass consolidations. Noah's work on other topics such as the availability of monetary relief in Title VII class actions after the Walmart decision has also been excellent. Other challenging topics he has assisted me with include third party litigation finance, divisive mergers to manage mass tort claims, and whether class actions should be allowed in arbitration.

Noah has successfully served as a judicial intern for Judge Lerner of the Court of Federal Claims, as a Law Clerk for the Potomac Legal Group, and this summer will gain additional experience in legal research and writing at Manatt, Phelps, & Phillips.

I suspect the reason for Noah's stellar success in everything he has attempted in law school follows from his work habits, his self-discipline, and his remarkable intelligence. On a personal level he is a delight to interact with in every way. He is dedicated and ambitious. I would be shocked if he did not prove to be one of your finest clerks. He certainly promises to be a fine lawyer. I urge you to give his application your most careful consideration.

If you should have any additional questions, please feel free to contact me by phone, by letter, or by email.

Kind regards.

Very truly yours,

Roger H. Trangsrud
James F. Humphreys Professor of Complex Litigation and Civil Procedure
The George Washington University
(202) 994-6182
rtrang@law.gwu.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Noah Kostick applied for a law clerk position in your chambers and requested that I support his application. I am pleased to do so. Noah was one of my interns for a semester during his second year. Under my law clerks' supervision, interns are expected to draft orders and memoranda on complex legal issues. While I do not directly supervise interns, my clerks work with them closely. By all accounts, Noah exceeded expectations. Noah also stood out to me for his good humor, research skills, and work ethic.

Without having taken evidence, Noah researched (and simplified) a complicated area of evidence law. In this case, one of my clerks grappled with how to apply the Daubert factors in a Vaccine Act claim where the special master serves as both judge and factfinder. This area of evidence law is challenging. Noah volunteered to work over the weekend to produce a highly useful memo for my law clerk, and nearly all of his research made it into the final opinion. It is rare to find interns who are eager to both tackle challenges and have the capability to add real value to our work.

Part of Noah's work ethic and teamwork likely comes from his time as a semi-professional hockey player. For instance, Noah was assigned to draft an order dismissing a prolific filer's motion for reconsideration. When he noticed that his co-intern had a lighter workload, he enlisted her to help him on some of the thornier legal issues—e.g., how is 'manifest injustice' defined in Federal Claims case law, and how do Rules 59(a) and 60 interact. Noah turned an individual assignment into a group effort and, as a result, produced a highly professional draft for a second-year law student. Noah's collaborative approach would likely be an asset to your chambers.

On paper, Noah checks many of the boxes for a clerkship: impressive transcript, journal experience, judicial internship, etc. Noah also has the personal qualities that are essential for success in chambers. My clerks genuinely enjoyed his presence and came to rely on his advanced research skills. I believe he would make a great clerk and hope you will closely consider his application.

Sincerely,

Judge Carolyn N. Lerner

Court of Federal Claims

Carolyn Lerner - Lerner_Chambers@cfc.uscourts.gov

Benjamin Grillot
3445 Clay Street NE
Washington, DC 20019
202-320-3872
bgrillot@law.gwu.edu

February 22, 2023

To Whom It May Concern:

I am an adjunct professor at the George Washington University Law School and had Noah Kostick as a student in my Fundamentals of Lawyering course for the 2021-2022 academic year.

Mr. Kostick is, quite simply, an outstanding student and will make an excellent attorney one day. He works hard, asks insightful questions, and is always willing to participate in class. He is an excellent writer and I am proud to say that he finished the year as one of my top students.

However, perhaps most importantly, Mr. Kostick brings a poise and maturity to law school that will serve him well in his career. He has a kind sense of confidence that is rare in first year law students. He is a natural leader, a creative thinker, and brought a positive outlook to every challenge he tackled.

After finishing my class Noah worked as Writing Fellow for the 2022-2023 academic year, providing feedback on writing for current first year students. Many of my current students have told me that their writing significantly improved with Noah's assistance.

I highly recommend Noah for a clerkship in your chambers. Noah is the rare student with a strong combination of analytical skills and people skills.

Please do not hesitate to contact me if you have any questions or would like any additional information. I rarely recommend anyone as highly as I recommend Noah for this position.

Sincerely,

/s/

*Benjamin J. Grillot*

Professorial Lecturer in Law
Legal Research and Writing Program
The George Washington University School of Law

# NOAH KOSTICK

Nkostick33@law.gwu.edu ▪ 904.881.4648 ▪ 1800 N Lynn St Apt #1405 Arlington, VA 22209

The following memorandum was written during my time as a judicial extern for the Honorable Carolyn N. Lerner at The United States Court of Federal Claims. This memorandum analyzed a repeat litigant's motion for reconsideration and request for leave to file notice of a motion to add a third-party intervenor. Much of the research from this memorandum and some of the language was used in the final order. This memorandum includes only my own research and writing with no edits from Judge Lerner or her clerks. Furthermore, Judge Lerner approved my use of this memorandum as a writing sample.

**To:** Judge Lerner
**From:** Noah Kostick
**Date:** 10.20.2022
**Re:** [redacted] motion for reconsideration and motion for leave to file notice of motion to add third-party intervenor

**MEMORANDUM**

Plaintiff's motion for reconsideration and motion for leave to file notice of motion to add third-party intervenor should be denied for the following reasons.

## I. Background

Plaintiff's claims arise from a settlement agreement between the United States and his former employer, Amgen. July 13, 2022 Opinion and Order ("Op.") at 1, ECF No. 30. In 2010, Plaintiff filed a *qui tam* complaint alleging that Amgen violated the False Claims Act ("FCA"). *Id.* Ultimately, his case was dismissed. *Id.* Soon after the dismissal, Amgen and the United States reached a multimillion-dollar settlement stemming from several similar *qui tam* complaints to which Mr. [redacted] was not a party. *Id.* at 1–2.

Since his initial suit, Plaintiff has a long history of litigating this matter. Plaintiff has sought relief from numerous forums, including private arbitration, the Equal Employment Opportunity Commission, state and federal trial courts in both Colorado and California, the Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. *See* Op. None have ruled for the Plaintiff. *Id.*

On June 15, 2021, Plaintiff filed a complaint in the Court of Federal Claims. Subsequently, on July 13, 2022, this Court dismissed Plaintiff's case for lack of jurisdiction. *See* Op. (dismissing Plaintiff's contract and Fifth Amendment claims because the statute of limitations lapsed; dismissing Plaintiff's *qui tam* claims because the Court of Federal Claims lacks jurisdiction over *qui tam* suits; dismissing Plaintiff's contract claims for lack of standing;

dismissing Plaintiff's First and Fourteenth Amendment claims for lack of subject matter jurisdiction over federal civil rights violations).

Plaintiff now moves that this Court reconsider. *See* Pl.'s Mot. for Recon. His primary reason for reconsideration sounds in *qui tam*. *Id.* at 1–2. Namely, a prior court has already implied, Mr. [redacted] argues, that he was an original relator. *Id.* Thus, Mr. [redacted] claims, this Court committed a mistake-in-fact when it determined that he was not a proper *qui tam* relator. *Id.* In addition, Plaintiff claims that this Court mistakenly labeled his contract claim as implied-in-law when it was an implied-in-fact contract claim. *Id.* Finally, Plaintiff asks this courts to review the decision made in other District and Circuit courts. *Id.* at 6–7.

Plaintiff also requests leave to file notice of motion to add third party intervenor, Amgen Inc. *See* Pl.'s Mot. for Leave. Chiefly, Plaintiff argues that Amgen's five-year Corporate Integrity Agreement is relevant to his statute of limitations defense in his concurrent motion for reconsideration. *Id.* Further, that joining Amgen to this litigation will prevent future "piece-mail" litigation. *Id.*

## II. **Legal Standards & Analysis**

Plaintiff makes two motions. First, a motion to reconsider under RCFC 59(a) and 60(b). Second, a request for leave under RCFC 14(b) to file notice of motion to add a third-party intervenor.

### **A. Motion for Reconsideration**

In Plaintiff's motion, he argues for reconsideration under both (1) RCFC 59(a) and (2) RCFC 60.

#### **1. RCFC 59(a)**

Rule 59(a) provides that rehearing or reconsideration may be granted: "(A) for any reason for which a new trial has heretofore been granted in an action at law in federal court; (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States." RCFC 59(a)(1). The Federal Circuit interprets RCFC 59 to require: "an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice." *Biery v. United States*, 818 F.3d 704, 711 (Fed. Cir. 2016) (quoting *Young v. United States*, 94 Fed.Cl. 671, 674 (Fed. Cl. 2010)); *see also Johnson v. United States*, 126 Fed. Cl. 558, 560 (2016) (citing *Bishop v. United States*, 26 Cl.Ct. 281, 286 (1992)).

To interpret "manifest injustice," courts define "manifest" as "[c]leary apparent to the sight or understanding; obvious." *Pac. Gas & Elec. Co. v. United States*, 74 Fed. Cl. 779, 785 (2006), *aff'd in part and rev'd in part*, 536 F.3d 1282 (Fed. Cir. 2008) (quoting *American Heritage Dictionary* at 1064 (4th ed.2000)); *see also Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002). So, the phrase "manifest [in]justice . . . refers to injustice that is apparent to the point of being almost indisputable." *Id.* A motion for reconsideration to prevent manifest injustice is rarely granted. *See Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1384 (Fed. Cir. 2010) (stating that motions to reconsider to prevent manifest injustice should be granted rarely); *Ingham Reg'l Med. Ctr. v. United States*, 155 Fed. Cl. 1, 19 (2021) (rejecting a motion for reconsideration to prevent manifest injustice because the party was "seeking to raise the same arguments previously made and ruled on by the Court"); *Shirlington Limousine & Transp., Inc. v. United States*, 78 Fed. Cl. 27, 31 (2007) (holding that a litigant

being "bound" to choose between the "GAO and the United States Court of Federal Claims" does not prevent manifest injustice, "but merely requires a plaintiff to weigh litigating options").

**a. *Qui Tam* Claims**

Plaintiff's primary RCFC 59(a) argument is restating his *qui tam* claims. However, "[i]t is unequivocal that this court lacks jurisdiction to hear *qui tam* suits." Op. at 9; *Downey v. United States*, No. 19-899C, 2019 WL 4014204 at *3 (Fed. Cl. Aug. 23, 2019) (citing LeBlanc, 50 F.3d at 1030–31). Even if a prior court had found that Plaintiff was an original realtor—which they did not—District Court is still the only jurisdiction where a *qui tam* claim may be heard. *See LeBlanc v. United States*, 50 F.3d 1025, 1031 (Fed. Cir. 1995) (citing 31 U.S.C. § 3732(a)). Further, the Plaintiff "has not identified any intervening change in the controlling law" that would give the Court jurisdiction to decide his *qui tam* claim. *Johnson v. United States*, 126 Fed. Cl. 558, 560 (2016).

In relation to Plaintiff's *qui tam* claim, Plaintiff makes a myriad of new accusations about his former attorneys. Pl. Mot. at 37-38. Including, that his former attorneys alleged conduct was one of the reasons he was not compensated as a *qui tam* realtor. *See id.* As a result of his former attorneys' actions, Plaintiff argues there is a need for reconsideration to "prevent manifest injustice." *Id.* The merits of this new argument do not need consideration, as this argument was not filed at the time of the complaint. *See Bluebonnet Sav. Bank, F.S.B. v. United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006) (dismissing government's argument because it was not made until their motion for reconsideration). Even if the attorneys' conduct could be considered, this Court still lacks jurisdiction to consider Plaintiff's *qui tam* claim. *See Downey*, 2019 WL 4014204 at *3. To be clear, when a court has "no jurisdiction to confirm or reject, [courts have] no authority to inquire into or pass upon the case, beyond…the question of jurisdiction." *United*

*States v. Baca*, 184 U.S. 653, 659 (1902); *see also Peretz v. United States*, No. 2021-1831, 2022 WL 1232118 at *6 (Fed. Cir. Apr. 26, 2022) (holding that the "Claims Court was unable to proceed to the merits once it determined that it did not have jurisdiction").

**b. Contract Claims**

Plaintiff also argues this Court erred by finding it lacked jurisdiction to hear his contract claim. *See* Pl. Recons. Mot. 13-14. Specifically, that this Court mistakenly found "at best an implied-in-law contract" when, Plaintiff argues, there was an implied-in-fact contract. *Id.* Yet, Plaintiff fails to identify any new facts unavailable at the time of litigation. Instead, Plaintiff argues that an "implied-in-fact contract should should…exist" because he was "Amgen's former employee." *Id.* Plaintiff being a former employer of Amgen is not a new fact and does not change the status of his contract claim. *See* Op. at 9-12. Nor has Plaintiff identified any "intervening changes in the controlling law" that would reclassify the contract claim or grant this court jurisdiction over an implied-in-law contract claim. *Biery v. United States*, 818 F.3d 704, 711 (Fed. Cir. 2016) (quoting *Young v. United States*, 94 Fed.Cl. 671, 674 (Fed. Cl. 2010)).

Likewise, Plaintiff argues that this Court erred by deciding that he was not in contractual privity with the Amgen settlement and thus, lacked standing. See Pl. Recons. Mot. 13-14. Plaintiff argues as a former Amgen employee, contractual privity existed because he "was a direct beneficiary under state and federal law." *Id.* at 14. Plaintiff's argument does not meet the high bar for reconsideration because he is "rais[ing] the same arguments previously made and ruled on by the Court." *Ingham Reg'l Med. Ctr. v. United States*, 155 Fed. Cl. 1, 19 (2021); Op. at 12.

In addition, Plaintiff states this Court improperly found his contract claim was outside the statute of limitations. *See* Pl. Recons. Mot. at 2-5. He argues that the continuing claims doctrine

brings his contract, and *qui tam*, claims inside the statute of limitations. *See id.* Even if this were true, this Court can still not consider Plaintiff's contract claims because, as previously explained, this Court cannot consider the merits when it lacks jurisdiction and the Plaintiff lacks standing. *See Peretz v. United States*, 2022 WL 1232118 at *6; Op. at 9.

Plaintiff's final contract argument is that the Government represented that his challenge to the Corporate Integrity Agreement should be brought in this court. *See* Pl. Recons. Mot. at 7-8. Whether or not this is true, it does not guarantee a ruling in Plaintiff's favor.

**c. Review of Circuit and District Court Decisions**

Furthermore, Plaintiff argues that the District Court for the Northern District of California and the Ninth Circuit erred by dismissing his *qui tam* claim for proceeding *pro se*. This Court, however, has no jurisdiction to review those decisions. *See Kimbrell v. United States*, No. 17-495C, 2021 WL 1906254 at *4 (Fed. Cl. May 12, 2021) (citing *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) ("[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts...."), (28 U.S.C. § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court ... [b]y writ of certiorari....")).

**2. RCFC 60**

Courts may also reconsider a decision pursuant to RCFC 60. Under RCFC 60(a), a "court may correct a clerical mistake or a mistake arising from oversight or omission wherever one is found." RCFC 60(a). RCFC 60(b) allows a court to "relieve a party…from a final judgment, order, or proceeding for the following reasons:"

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 60(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;

> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

RCFC 60(b)(1)-(6). RCFC 60(b)(6) is a "catch-all category," that may only be applied in "extraordinary circumstances." *Peretz v. United States*, No. 2021-1831, 2022 WL 1232118 at *6 (Fed. Cir. Apr. 26, 2022), then *id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 (1988)). As the Government notes, Gov. Resp. at 3, RCFC 60(b)(1) and 60(b)(6) are "mutually exclusive," so that a party cannot obtain relief on both grounds. *Delpin Aponte v. United States*, No. 05-1043C, 2014 WL 3725933 at *1 n.2 (Fed. Cl. July 23, 2014) (citing *Stevens v. Miller*, 676 F.3d 62, 67 (2nd Cir. 2012)).

Furthermore, motions for reconsideration must be supported "by a showing of extraordinary circumstances which justify relief." *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), aff'd, 250 F.3d 762 (2000)). Such a motion, however, "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 1995)). In addition, "a motion for reconsideration is not intended . . . to give an 'unhappy litigant an additional chance to sway' the court." *Matthews v. United States*, 73 Fed. Cl. 524, 525 (2006) (quoting *Froudi v. United States*, 22 Cl. Ct. 290, 300 (1991)).

On Plaintiff's RCFC 60 arguments, he first identifies that RCFC 60(a) provides relief for "clerical mistakes; oversights and omissions." RCFC 60(a); Pl. Recons. Mot. at 18. Contrary to Plaintiff's assertion, this Court lacking jurisdiction to hear his *qui tam* claim was not an "oversight." *Id.* And not finding an actionable contract claim were not "clerical mistakes;

oversights and omissions." *Id.* Those claims were intentionally denied for procedural and substantive reasons. *See generally* Op. As a result, Plaintiff's RCFC 60(a) argument should be denied.

Finally, Plaintiff cites RCFC 60(b)(6) which gives courts discretion to grant relief for "any other justified reason," but should only be applied in "extraordinary circumstances*." Peretz v. United States*, No. 2021-1831, 2022 WL 1232118 at *6 (Fed. Cir. Apr. 26, 2022), (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 (1988)). Plaintiff does not, however, specify which of his arguments fall under RCFC 60(b)(6). *See* Pl. Recons. Mot. at 17. Regardless of Plaintiff's ambiguity, he reargues the same points that have already been considered by this Court. Doing so is simply not an "extraordinary circumstance[]" to apply RCFC 60(b)(6). *Peretz*, 2022 WL 1232118 at *6 (affirming a Court of Claims RCFC 60(b)(6) denial because the plaintiff "re-assert[ed]…arguments he had previously made during…motion to dismiss); *see also IAP Worldwide Servs., Inc. v. United States*, 141 Fed. Cl. 788, (2019) (quoting *Cyios Corp. v. United States*, 124 Fed. Cl. 107, 113 (2015) ("[e]xamples of extraordinary circumstances include: (1) the conduct of proceedings without the knowledge of the losing party; (2) unusual combinations of health and financial difficulties; or (3) gross negligence or severe misconduct by counsel")).

In sum, for the aforementioned reasons, Plaintiff's motion for reconsideration should be denied.

**B. Request for Leave to File Notice of Motion to Add Third Party Intervener**

RCFC 14(b) allows "[t]he court, on motion or on its own, [to] notify any person with the legal capacity to sue or to be sued who is alleged to have an interest in the subject matter of the suit." However, "[a] plaintiff must file any motion for notice at the time the complaint is filed."

RCFC 14(b)(2)(B)(i). Alternatively, "[f]or good cause shown, the court may allow a motion for notice to be filed at a later time." RCFC 14(b)(2)(B)(iii). To determine if "'good cause' exists, the Court takes into consideration (i) the reasons for defendant's post-answer filing and for any delays in filing, and (ii) whether Plaintiff is prejudiced by the delayed filing." *Sci. Applications Int'l Corp. v. United States*, 148 Fed. Cl. 268, 271 (2020). Relevant here, good cause does not exist when the movant was aware of the third party's relation to the case before the motion. *See Morphotrust USA, LLC v. United States*, No. 16-227, 2017 WL 4081812, at *1-2 (Fed. Cl. Sept. 15, 2017) (denying RCFC 14(b) motion because movant was aware of the third party's relation to the case prior to the motion).

RCFC 24(b) gives courts discretion to grant third-party motions for permissive intervention when the third party "has a claim or defense that shares with the main action a common question of law or fact." RCFC 24(b)(1)(B). To be clear, RCFC 24(b) does not allow a current party to the litigation to add a third party. *See* RCFC 24(b); *John R. Sand & Gravel Co. v. Brunswick Corp*., 143 F. App'x 317, 318 (Fed. Cir. 2005) (considering third party's RCFC 24(b) motion to intervene); *Freeman v. United States*, 50 Fed. Cl. 305, 310 (2001) (evaluating third party's RCFC 24(b) motion to intervene).

In this case, Plaintiff moves under RCFC 14(b) and RCFC 24(b)[1] in their request for leave to file notice of motion to add third-party intervenor. Neither can be used by Plaintiff.

First, RCFC 14(b) requires "'any motion for notice at the time the complaint is filed,' or '[f]or good cause shown, the court may allow a motion for notice to be filed at a later time.'" Gov. Resp. at 8 (quoting RCFC 14(b)(2)(b)). Here, Plaintiff did not file the motion at the time of the complaint but waited till after filing their motion for reconsideration. Further, good cause

[1] Plaintiff cites "Rule 24(b)." Pl. Inter. Mot. at 1. This memorandum assumes RCFC 24(b) is the rule Plaintiff references.

does not exist because Plaintiff knew of Amgen's relationship to the case prior to the motion. *See Morphotrust USA, LLC v. United States*, No. 16-227, 2017 WL 4081812, at *1-2 (Fed. Cl. Sept. 15, 2017) (denying RCFC 14(b) motion because movant was aware of the third party's relation to the case prior to the motion). In fact, many of Plaintiff's arguments rely on their former employment with Amgen, and Amgen's settlement with the government. *See generally* Pl. Compl.

Second, RCFC 24(b) provides a court discretion to grant permissive intervention to a *third-party* movant. It cannot be used by a current party to the litigation—like Plaintiff. *See* RCFC 24(b); *John R. Sand & Gravel Co. v. Brunswick Corp*., 143 F. App'x 317, 318 (Fed. Cir. 2005) (considering third party's RCFC 24(b) motion to intervene); *Freeman v. United States*, 50 Fed. Cl. 305, 310 (2001) (evaluating third party's RCFC 24(b) motion to intervene). Finally, the concurrent motion for reconsideration should be denied removing any litigation to add a third-party to. Accordingly, Plaintiff's request for leave to file notice of motion to add third-party intervenor should be denied.

**IV. Conclusion**

In sum, plaintiff's motion for reconsideration, ECF No. 32, and request for leave to file notice of motion to add third-party intervener, ECF No. 33, should be denied.

## Applicant Details

| | |
|---|---|
| First Name | **Matthew** |
| Middle Initial | **L** |
| Last Name | **Krantz** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **mlkrantz@alumni.stanford.edu** |
| Address | **Address**<br>Street<br>**770 5th Street NW Apartment 716**<br>City<br>**Washington**<br>State/Territory<br>**District of Columbia**<br>Zip<br>**20001**<br>Country<br>**United States** |
| Contact Phone Number | **(216) 470-5164** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Dartmouth College** |
| Date of BA/BS | **June 2016** |
| JD/LLB From | **Stanford University Law School**<br>**http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011** |
| Date of JD/LLB | **June 12, 2022** |
| Class Rank | **School does not rank** |
| Law Review/ Journal | **Yes** |
| Journal(s) | **Stanford Law Review**<br>**Stanford Technology Law Review** |
| Moot Court Experience | **No** |

## Bar Admission

| | |
|---|---|
| Admission(s) | **District of Columbia** |

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **Yes** |

## Specialized Work Experience

## Recommenders

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Matthew L. Krantz**
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March 23, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I was excited to hear of your recent confirmation to the United States District Court for the Eastern District of Virginia. I am a graduate of Stanford Law School, and I write to apply to serve as your law clerk in 2024-2025. I will be clerking for the Honorable Cheryl Ann Krause on the Third Circuit in 2023-2024, and I would be grateful for the chance to work with you in the following year.

Enclosed you will find my resume, references, law school transcript, and writing sample. Professor David Freeman Engstrom, Professor Anne Joseph O'Connell, and Professor Alan O. Sykes have written letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Matthew Louis Krantz

# Matthew L. Krantz

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## EDUCATION

**Stanford Law School**, Stanford, CA — June 2022
J.D.
Honors: Gerald Gunther Prize for Outstanding Performance in Torts; John Hart Ely Prize for Outstanding Performance in Innovating Privacy Protection
Journals: *Stanford Law Review* (Managing Editor, Vol. 74; Member Editor, Vol. 73)
*Stanford Technology Law Review* (Symposium Chair, Vol. 24; Member Editor, Vol. 23)
Activities: Jewish Law Students Association (Mentorship Chair); OutLaw (Member)

**Dartmouth College**, Hanover, NH — June 2016
A.B., *summa cum laude*, in Computer Science and Chinese
Honors: Phi Beta Kappa; Citation for Academic Excellence in Algorithms
Activities: Dartmouth Outing Club First-Year Trips (Trip Leader and Support Crew Member); Outdoor Leadership Experience (Volunteer); CS 1 Teaching Assistant

## EXPERIENCE

**United States Court of Appeals for the Third Circuit**, Philadelphia, PA — August 2023 – August 2024
*Law Clerk to the Honorable Cheryl Ann Krause*

**Latham & Watkins LLP**, Washington, D.C. — June 2021 – August 2023
*Litigation Associate* (October 2022 – August 2023)
*Summer Associate* (June 2021 – August 2021)

**Juelsgaard Intellectual Property and Innovation Clinic**, Stanford, CA — March 2021 – March 2022
*Certified Law Student*
- Submitted comment on behalf of startup-advocacy nonprofit in Copyright Office rulemaking
- Wrote and filed two appellate briefs on behalf of intellectual property law professors

**Professor Alan O. Sykes, Stanford Law School**, Stanford, CA — August 2020 – January 2021
*Teaching Assistant for Torts*
- Led weekly sessions to review torts doctrine and work through practice problems
- Drafted and evaluated midterm and final examinations

**Electronic Privacy Information Center**, Washington, D.C. — June 2020 – August 2020
*Law Clerk*
- Drafted legal memoranda on COVID-19 tracking, biometric data use, and the CFAA
- Cowrote Supreme Court brief addressing proper scope of FOIA Exemption 5

**Epic Systems**, Madison, WI — September 2016 – May 2019
*Genetics Product Lead* (April 2018 – May 2019)
- Worked with clinicians and Epic leadership to shape future vision of Genetics application
- Coordinated across roles to ensure successful installation and launch of Genetics module

*Software Development Team Lead* (January 2018 – May 2019)
- Managed and evaluated four-member Genetics team as lead software developer
- Oversaw project management and long-term development planning

*Software Developer* (September 2016 – January 2018)
- Migrated legacy view and infrastructure code to new Hyperspace Web framework
- Primary developer contact for tobacco and family histories

## ADDITIONAL INFORMATION

Programming: C#/.NET, TypeScript, JavaScript, HTML, CSS, Java, Python, C
Interests: Architecture, Technology, Summer Camp

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# STANFORD UNIVERSITY
## OFFICE OF THE UNIVERSITY REGISTRAR
## STANFORD, CA 94305-6032

**Name: Krantz,Matthew Louis**
**Student ID: 05786653**

Johanna Metzgar
Registrar



Print Date: 08/28/2022

**-------- Stanford Degrees Awarded --------**

Degree : Doctor of Jurisprudence
Confer Date : 06/12/2022
Plan : Law

**-------- Academic Program --------**

Program : Law JD
09/23/2019 : Law (JD)
Completed Program

**-------- Beginning of Academic Record --------**

### 2019-2020 Autumn

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 201 | CIVIL PROCEDURE I<br>David Freeman Engstrom | 5.00 | 5.00 | H |
| LAW | 205 | CONTRACTS<br>Barbara Fried | 5.00 | 5.00 | H |
| LAW | 219 | LEGAL RESEARCH AND WRITING<br>Ji Seon Song | 2.00 | 2.00 | H |
| LAW | 223 | TORTS | 5.00 | 5.00 | H |
| Transcript Note: | | Gerald Gunther Prize for Outstanding Performance<br>Alan Sykes | | | |
| LAW | 240G | DISCUSSION (1L): INNOVATION AND INEQUALITY<br>Lisa Ouellette | 1.00 | 1.00 | MP |

### 2019-2020 Winter

Some winter LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 203 | CONSTITUTIONAL LAW<br>Jenny Martinez | 3.00 | 3.00 | MPH |
| LAW | 207 | CRIMINAL LAW<br>Robert Weisberg | 4.00 | 4.00 | MPH |
| LAW | 224A | FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK<br>Anna Mance | 2.00 | 2.00 | MPH |
| LAW | 2401 | ADVANCED CIVIL PROCEDURE<br>Diego Zambrano | 3.00 | 3.00 | MPH |

### 2019-2020 Spring

All spring LAW courses graded MPH/F (Mandatory Pass-Health) due to pandemic.

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 217 | PROPERTY<br>Mark Kelman | 4.00 | 4.00 | MPH |
| LAW | 224B | FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE<br>Anna Mance | 2.00 | 2.00 | MPH |
| LAW | 4005 | INTRODUCTION TO INTELLECTUAL PROPERTY<br>Mark Lemley | 4.00 | 4.00 | MPH |
| LAW | 4050 | AI AND RULE OF LAW: A GLOBAL PERSPECTIVE<br>David Freeman Engstrom; Marietje Schaake | 2.00 | 2.00 | MPH |

### 2020-2021 Autumn

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 807S | POLICY PRACTICUM: INNOVATING PRIVACY PROTECTION: TOOLS AND STRATEGIES FOR CALIFORNIA CITIES<br>Phillip Malone; Tom Rubin | 2.00 | 2.00 | H |
| Transcript Note: | | John Hart Ely Prize for Outstanding Performance | | | |
| LAW | 4015 | MODERN SURVEILLANCE LAW<br>Richard Salgado; Todd Hinnen | 2.00 | 2.00 | H |
| LAW | 7001 | ADMINISTRATIVE LAW<br>Anne O'Connell | 4.00 | 4.00 | H |
| LAW | 7041 | STATUTORY INTERPRETATION<br>Jane Schacter | 3.00 | 3.00 | P |
| LAW | 7101 | ELECTION 2020<br>James Steyer; Pamela Karlan | 1.00 | 1.00 | MP |

### 2020-2021 Winter

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 2402 | EVIDENCE<br>George Fisher | 5.00 | 5.00 | P |
| LAW | 4001 | MEDIA, TECHNOLOGY, AND THE FIRST AMENDMENT<br>Barbara van Schewick | 3.00 | 3.00 | H |
| LAW | 4046 | DATA: PRIVACY, PROPERTY AND SECURITY<br>Paul Goldstein; Tom Rubin | 3.00 | 3.00 | P |



Send To: Matt Krantz
USA

# STANFORD UNIVERSITY
## OFFICE OF THE UNIVERSITY REGISTRAR
## STANFORD, CA 94305-6032

**Name: Krantz,Matthew Louis**
**Student ID: 05786653**

Johanna Metzgar
Registrar



### 2020-2021 Spring

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 914A | JUELSGAARD INTELLECTUAL PROPERTY AND INNOVATION CLINIC: CLINICAL PRACTICE<br>Phillip Malone | 4.00 | 4.00 | H |
| LAW | 914B | JUELSGAARD INTELLECTUAL PROPERTY AND INNOVATION CLINIC: CLINICAL METHODS<br>Phillip Malone | 4.00 | 4.00 | P |
| LAW | 914C | JUELSGAARD INTELLECTUAL PROPERTY AND INNOVATION CLINIC: CLINICAL COURSEWORK<br>Phillip Malone | 4.00 | 4.00 | H |

### 2021-2022 Autumn

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 1029 | TAXATION I<br>Joseph Bankman | 4.00 | 4.00 | P |
| LAW | 4017 | ADVANCED TORTS: DEFAMATION, PRIVACY, AND EMOTIONAL DISTRESS<br>Robert Rabin | 3.00 | 3.00 | H |
| LAW | 6001 | LEGAL ETHICS<br>Norman Spaulding | 3.00 | 3.00 | P |
| LAW | 7821 | NEGOTIATION<br>Colleen Popken; Janet Martinez | 3.00 | 3.00 | MP |

### 2021-2022 Winter

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 914 | ADVANCED JUELSGAARD INTELLECTUAL PROPERTY AND INNOVATION CLINIC<br>Phillip Malone | 3.00 | 3.00 | H |
| LAW | 2403 | FEDERAL COURTS<br>Norman Spaulding | 4.00 | 4.00 | P |
| LAW | 7051 | LOCAL GOVERNMENT LAW<br>Richard Ford | 3.00 | 3.00 | P |

### 2021-2022 Spring

| Course | | Title | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAW | 1013 | CORPORATIONS<br>Sarath Sanga | 4.00 | 4.00 | H |
| LAW | 1043 | BLOCKCHAIN AND CRYPTOCURRENCIES: LAW, ECONOMICS, BUSINESS AND POLICY<br>Jeff Strnad | 4.00 | 4.00 | MP |
| LAW | 7010A | CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT<br>Goodwin Liu | 3.00 | 3.00 | H |

END OF TRANSCRIPT



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## Stanford Law School's Grading System

In the fall of 2008, Stanford Law School adopted the following grading system for all courses:

| | | |
|---|---|---|
| **H** | Honors | Exceptional work, significantly superior to the average performance at the school |
| **P** | Pass | Representing successful mastery of the course material |
| **MP** | Mandatory Pass | Representing P or better work. (No Honors grades are available for Mandatory P classes.) |
| **MPH** | Mandatory Pass - Public Health Emergency* | Representing P or better work. (No Honors grades are available for Mandatory P classes.) |
| **R** | Restricted Credit | Representing work that is unsatisfactory |
| **F** | Fail | Representing work that does not show minimally adequate mastery of the material |
| **L** | Pass | Student has passed the class. Exact grade yet to be reported |
| **I** | Incomplete | |
| **N** | Continuing Course | |
| **[blank]** | | Grading Deadline has not yet passed. Grade has yet to be reported. |
| **GNR** | Grade Not Reported | Grading Deadline has passed. Grade has yet to be reported. |

In addition to the above grades, professors may award class prizes to recognize extraordinary performance in a particular course. These prizes are rare. No more than one prize may be awarded for every 15 students enrolled in the course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor. The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year Legal Research & Writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

**Interpreting Stanford's Grades:**
Grading policies vary significantly from school to school. Other schools that have a similar system impose no limits on the number of Honors grades awarded. As a result, one might see 70-80% of a class receiving Honors. Stanford Law School, by comparison, imposes strict limitations on the percentage of Honors grades that professors may award. These vary slightly depending on the class, but employers should expect to see approximately one-third of our students receiving Honors in any exam class. For this reason, we strongly encourage employers who use grades as part of their hiring criteria to set standards specifically for Stanford students, and to consider grades in the context of other information about a candidate, such as faculty recommendations, pre-law school academic and professional experience, law school activities, and an interviewer's own impressions of the individual.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter Quarter 2020 and all classes held during Spring Quarter 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

Updated May 2020

Anne Joseph O'Connell
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April 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write, with the greatest enthusiasm, to recommend Matthew (Matt) Krantz for a district court clerkship in your chambers. Matt earned a rare, straight Honors record in the graded parts of the required first-year curriculum (along with a prize in Torts) and a near Honors record in the fall of his second year, including in my challenging Administrative Law class (just missing a prize). Stanford Law School's grading curve is far stricter, with fewer Honors grades permitted, than the grading system at our peer institutions, Yale and Harvard. Naturally, Matt's grades had to dip somewhat once he became a Managing Editor of the *Stanford Law Review* in the winter quarter of his second year due to the demanding nature of the position—a full-time job of Blue booking, cite checking, and line editing, along with the creation of the Candidate Exercise for current first-year students.

Matt's legal acumen, writing talent, and attention to detail, along with four years of professional work experience between college and law school and two years of post-law school practice (including as a clerk for Judge Cheryl Ann Krause next year), strike me as the perfect combination for a law clerk in a fast-paced district court chambers.

I met Matt in September 2020 when he and sixty-three other students enrolled in my Administrative Law class, which was primarily taught on Zoom due to the pandemic (with some small in-person sessions). The course addresses the structure of administrative agencies and their place in a governing scheme of separated but overlapping powers; delegation of authority to agencies, types and requirements of agency decision-making; availability and scope of judicial review of agency action (and inaction); and other forms of agency oversight. It examines a range of policy areas, including the environment, national security, health care, food and drugs, and telecommunications. It is not an easy class. In addition to the final examination, I require students, on their own or in a small group, to complete a response paper on class material (with the option of doing a second and having the higher score count) as well as to draft a comment to a particular open regulatory proceeding and reflection essay on the comment.

Matt and two classmates jumped right into the response paper topics, evaluating Judge Williams's proposal that "where there was no indication that the plaintiff had participated in the rulemaking in any way," the court should not determine that the plaintiff's arguments in litigation against the rulemaking are waived (assuming they are timely brought) as well as predicting how agencies would change their practices under such a rule. In a good essay, they argued: "Waiving the comment requirement for litigation risks undermining predictability and incentivizing actors to forgo participation in rulemaking. Nevertheless, we believe that Judge Williams's proposal is desirable because it addresses distributive issues and could expand access to rulemaking generally." While the essay did mistakenly assume (as almost every group does on this question) that sophisticated parties would skip commenting to take advantage of the proposal (but it is better to get what you want at the agency level than having to litigate), it shined in using class material to consider how under-resourced parties "might lack the resources to anticipate 'logical outgrowths' of the NPRM …. given that 'reasonable foreseeability' is based on knowledge of regulatory insiders" as well as noting how agencies could "expan outreach to impacted groups."

For the second assignment, Matt's group savvily took on the perspective of the fictional Vermont Yankees Loggers Association, in their words, "a key part of President Trump's base," to comment on the Department of Labor's 2020 proposed rule on how to determine independent contractor status under the Fair Labor Standards Act. In addition to nicely raising concerns with the proposed rule itself and the agency's justifications, their comment proposed a compelling alternative: "We therefore ask Labor to reconsider its interpretation of the 'economic reality' test—especially as applied to loggers and other industrial workers—and instead weigh all factors equally. At the very least, in light of the Association's reliance, we ask that Labor preserve [the relevant regulation] in its current form." The well-written and smartly structured reflection essay discussed their persuasive, litigation, and political strategies, drawing from an impressive range of class material and outside research (the latter was not required).

In the primary evaluative tool in my class, a timed and difficult take-home examination, Matt shined, submitting the fourth best examination in an extremely talented class. He excelled on both doctrinal questions—one based on the Trump Administration's Schedule F directive (to move many agency workers from the competitive service to a new series in the excepted service, which would lack the civil service's removal protections) that drew on constitutional and statutory interpretation issues and one involving a hypothetical interim final rule on procedures for issuing guidance and sunsets for economically significant rules that required complex analysis under the Administrative Procedure Act (APA) and consideration of non-legal arguments. He also wrote a stellar answer to the final (more policy-based) question—whether courts should apply more scrutiny under section 706 of the APA to policy determinations that depend, at least in part, on cost-benefit analysis and whether scrutiny of such policy determinations should vary by agency type (e.g., cabinet department, independent regulatory commission).

Matt's exceptional examination showed that he not only understood complex legal doctrine, but that he could apply it in snappy, succinct prose. I asked to use about half of his exam answers in the packet of model responses. Combining his writing assignments and his final examination, Matt earned the highest Honors grade in the class that did not receive a prize.

In gathering information for this letter, I asked Matt to estimate the time commitment of being a Managing Editor of the *Stanford Law Review*. I assumed that the commitment was meaningful, but I was shocked at the responsibilities, as Matt never complained or seemed stressed in our multiple conversations during the period he served in the role. In the spring of his second year, he completed three "pre-galley" reviews—for each, he Blue booked, cite checked, and line edited an entire Article in under ten days (40-60 hours)—and two "post-galley" reviews (20-30 hours). He also co-created with the other Managing Editors the Candidate Exercise (20 hours weekly for the peak period) that first-year students completed as part of the journal's membership selection process. Most of his third year kept up this pace. I smiled when I saw in his background materials for this letter that he supervised several dozen counselors in charge of 100 eighth grade girls in an eight-week overnight camp program in college. He has the personality to carry that off (I do not).

In sum, Matt would be a tremendous law clerk. He not only thinks clearly (after all, he majored in computer science and programmed professionally), but also writes well. And he is an eagle-eyed editor. If you should need any additional information, please contact me at (650) 736-8721 or at ajosephoconnell@law.stanford.edu. I would be delighted to talk more about Matt.

Sincerely,

/s/ Anne Joseph O'Connell
Adelbert H. Sweet Professor of Law

Law Clerk, Judge Stephen F. Williams
Law Clerk, Justice Ruth Bader Ginsburg

David Freeman Engstrom
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March 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Matt Krantz is a gem—a smart, funny, unassuming talent. From Civil Procedure to my class on AI and Rule of Law, Matt never failed to impress with his sharp analytics, his good humor, and his pitch-perfect professionalism. But what distinguishes Matt from many other candidates you'll see is something that is harder to capture: Matt is a gamer. He was always willing to try out an answer to an especially tough question in class when there are few other takers. He always showed up at optional discussion sections. And he was always at the podium after class, even when he didn't have a question, so he could listen in and soak up what others were thinking about. There's just a guileless and refreshing desire to learn and share ideas with others that I found quite distinctive and remarkable. Matt's mix of talent, energy, and intellectual curiosity will make him a terrific and trusted law clerk. I hope you'll hire him.

Matt was simply sensational in 1L Civil Procedure—one of the intellectual leaders of the class. He made frequent, insightful, and good-humored contributions that demonstrated a natural ability to do what I spend so much time trying to get 1Ls to do: rooting arguments first and foremost in the text of rules and in cases, rather than intuiting answers to questions or moving straight to policy arguments (where they often feel more at home). From the start, Matt modeled that skill for the other students and raised the standard of the entire group.

Matt also showed all the markers of a talented litigator in the making. He was especially good, and often exceptional, when thinking through strategic litigation questions. A prime example was when he led the class through the removal-and-transfer sequence of *Pipe Aircraft v. Reyno*, explaining at each step why the defendants did what they did. Doing so requires synthesis of a bunch of topics covered to that point in the course: personal jurisdiction, subject matter jurisdiction and removal, and the venue statutes. Matt covered each flawlessly—and he also thought beyond the doctrine to the practical stakes. Thinking about litigation strategy comes easy to him—and I'm sure that full-on litigation judgment is not far behind. That skill will surely serve him well in chambers.

Matt's exam did not disappoint. He finished fourth best in a class of 30, earning a strong Honors grade, reserved for the top one-third of a class at Stanford, and only narrowly missing a "book prize," awarded to the very top performers in each course. His exam showed mastery on both the issue spotter section and an open-ended essay question—more open-ended than I usually give—that asked students to state a view on trans-substantivity in procedure.

Two quarters later, during his 1L spring, Matt enrolled in AI and Rule of Law, a course I co-taught with Marietje Schaake, a senior lecturer at Stanford, a former member of the EU Parliament, and a leading European voice on tech regulation. Based at the Law School, the class featured a dense mix of theory, institutional analysis, technical features of artificial intelligence, and case law. Each class session was trained on a different aspect of the legal and governance challenges posed by AI. Concrete examples and applications spanned subject areas (government and court use of AI, data privacy, autonomous weapons, etc.) and the globe (the U.S., Europe, China, and beyond). As such, the course rewarded careful integration of course readings pitched at very different levels of abstraction. Some of the law students who took the course, trained to analyze legal doctrine, lacked the intellectual breadth to make connections across the far-ranging course material. And some of the students with graduate school backgrounds could not master the arcane details of particular institutional contexts or think in concrete terms about how governance or legal design choices impact ground-level realities. Very few students, in other words, displayed mastery of trees *and* forest. Matt navigated both with ease, as he demonstrated time and again during his regular attendance with a group of particularly active students at optional discussion sections.

Matt's talents were also evident in his research paper, an astute and carefully written exploration of how the use of new algorithmic tools within the legal system—from risk assessment tools for bail, sentencing, and parole decisions on the criminal side of the system to tools that lawyers are increasingly relying upon on the civil side—might reshape law by pushing it toward a form of "codified" justice. His paper, however, went beyond these ideas and thought through, in a concrete and useful way, how new forms of oversight and validation of such tools might be necessary to safeguard against undesirable evolutionary paths. The paper wonderfully reflected the mind of a law student grappling with a set of deep jurisprudential questions, but with a practical side that clearly grew out of Matt's time working in tech prior to law school. Matt's ability to think big but concretely is a powerful

combination and bodes well for his time as a law clerk.

Finally, Matt's superior performance in both of my classes appears to have been par for the course for him. Matt carved out a truly excellent record of achievement at Stanford Law, but his transcript requires some unpacking. When COVID-19 hit, Stanford Law School, like many other law schools, moved its instruction online and eliminated grading. As a result, Matt's transcript contains two full quarters of mandatory pass-fail (designated MPH) grades. However, the rest of his transcript tells you all you need to know: Matt earned Honors grades—once again, reserved for the top-third of students in a given course—in two-thirds of the courses he took. That's a remarkable achievement, especially given the rigor of Stanford's grading system. Unlike some of our peer schools, which place no upper limit on the number of students who can earn an Honors grade in a course, Stanford strictly limits the proportion who can do so. At certain other schools, it is common for a non-trivial number of students to earn all Honors grades across all three years of law school. At Stanford, by contrast, it is not unusual for *every* student in the 1L class to emerge from the first year with at least one Pass grade, and even earning two-thirds Honors grades is enough to place a student in the top 15 percent of the class. Matt's performance puts him in that elite group.

Adding all of this together, and even with a pandemic-truncated transcript, it is clear that Matt was in the very top echelon of students in the Stanford Law School class of 2022. When you add in Matt's curiosity and confidence and his gamer-ness, the picture is clear: Matt will be a productive, professional, and zero-risk addition to any chambers, and I can enthusiastically recommend him without any hesitation whatsoever.

If I can supply further information, please do not hesitate to call me. My cell phone number, the best way to reach me, is 650-739-5851.

Sincerely,

/s/ David Freeman Engstrom

David Freeman Engstrom - dfengstrom@law.stanford.edu - 650-723-9148

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March 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to offer my highest recommendation for Matthew Krantz. Matt was a star student at Stanford, certainly among the best in his class, and was chosen by his peers to serve as Managing Editor of the *Stanford Law Review*. His transcript as a whole is terrific, reflecting Honors grades in nearly every class.

In my torts class, Matt was deeply engaged on matters of both doctrine and policy, and he was invariably thoroughly prepared. When students had difficulties and discussions wandered off track, I could always rely on Matt to guide us back in the right direction. By the end of our class sessions, I had identified Matt as a top student and fully expected his exam to be terrific. The exam met and exceeded my high expectations for incisive analysis and clarity. I also learned this past Fall that his student outline for the class is now widely circulating online and was the choice of most of the students in the class last Fall to serve as the foundation for their own outlines.

Matt was the first student I contacted with an offer to serve as teaching assistant in the Fall of 2020, and he quickly accepted. I knew at the time that the year would be especially challenging, with all classes expected to be online (as indeed they were). This situation presented special pedagogical difficulties and raised serious concerns about the emotional health and morale of our entering first-year students, who would for the most part be confined to their dorm rooms and unable to interact socially or professionally with their peers. I felt that Matt, with his outgoing and invariably cheerful personality to accompany his enormous intellectual gifts, would be an ideal person to help us through these challenges, and my judgment in that regard was quickly confirmed. We were able to organize small group sessions with students that met outdoors to work through analytical problems and discuss other issues in the class. Because only a few students at a time were allowed to gather, we divided the class among us each week, and several meetings a week were nevertheless necessary to give all students an opportunity to participate. Many students reported that these small group meetings were very important for them intellectually and emotionally, and I received many glowing comments about Matt for the sessions that he led.

In addition, I relied on Matt to help me design analytical discussion problems for the small group sessions, and for ideas about questions for the final exam. He was also very helpful in assisting me to grade the final exam. I had great faith in his judgment about the quality of student answers.

On a personal level, Matt is outgoing, affable and invariably good-humored. I cannot recall an occasion when I did not see him smiling. He is without a doubt among the most popular students in his class. Matt is also pleasantly non-ideological and tolerant of divergent viewpoints, an increasingly rare trait among law students these days. I can assure you that you would enjoy the chance to get to know him, and that he would be a pleasure to have in chambers.

In sum, I offer Matt my highest recommendation. His intellectual strengths, combined with his interpersonal skills and cheery outlook, make him a truly extraordinary clerkship candidate. If I can be of any further assistance on his behalf, please do not hesitate to call or write.

Sincerely,

/s/ Alan Sykes

StanfordLawSchool

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# Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

| | | |
|---|---|---|
| **H** | Honors | Exceptional work, significantly superior to the average performance at the school. |
| **P** | Pass | Representing successful mastery of the course material. |
| **MP** | Mandatory Pass | Representing P or better work. (No Honors grades are available for Mandatory P classes.) |
| **MPH** | Mandatory Pass - Public Health Emergency* | Representing P or better work. (No Honors grades are available for Mandatory P classes.) |
| **R** | Restricted Credit | Representing work that is unsatisfactory. |
| **F** | Fail | Representing work that does not show minimally adequate mastery of the material. |
| **L** | Pass | Student has passed the class. Exact grade yet to be reported. |
| **I** | Incomplete | |
| **N** | Continuing Course | |
| **[blank]** | | Grading deadline has not yet passed. Grade has yet to be reported. |
| **GNR** | Grade Not Reported | Grading deadline has passed. Grade has yet to be reported. |

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

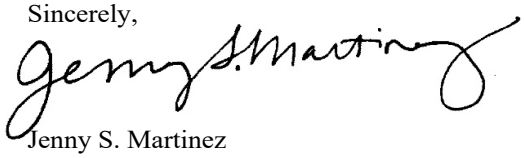
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

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## WRITING SAMPLE

I prepared the attached writing sample for an assignment in Modern Surveillance Law, a Fall 2020 course at Stanford Law School. The assignment required analyzing whether the third-party doctrine still has life after *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Based on the assignment's instructions, the submitted paper could not exceed ten pages. This work is entirely my own and has not been edited by others.

# Alive or on Life Support?

# The Third-Party Doctrine Post-*Carpenter*

Matt Krantz

Modern Surveillance Law (LAW 4015)

Professors Todd Hinnen and Richard Salgado

Fall Quarter 2020

Paper 1

## Introduction

When the Supreme Court decided *Carpenter* in 2018, Chief Justice Roberts went to great lengths to emphasize the Court's narrow ruling. "We do not express a view on matters not before us," he wrote.[1] "We do not disturb the application of *Smith* or *Miller* or call into question traditional surveillance techniques and tools."[2] The majority did not upend the third-party doctrine, according to Chief Justice Roberts. It simply "decline[d] to extend *Smith* and *Miller*" to cover the "novel circumstances" surrounding cell-site location information (CSLI).[3]

The dissenters saw things differently. Justice Gorsuch read the majority opinion as a rejection of *Smith* and *Miller*, and he criticized the Court for keeping these decisions "on life support" rather than overturning them.[4] Justice Kennedy went further, framing the majority opinion as a "reinterpretation of *Miller* and *Smith*" and warning of "dramatic consequences" that could extend "beyond cell-site records to other kinds of information."[5]

Which of these views, if any, is correct? Answering this question requires determining whether the third-party doctrine still has life after *Carpenter*. In practice, Chief Justice Roberts seems to have prevailed. In the two years following *Carpenter*, "lower courts have largely heeded the Court's admonition that its decision was a narrow one, and declined to extend Fourth Amendment protection to a variety of non-content data types."[6] Yet in theory, Justice Kennedy's argument still stands. *Carpenter*'s language is broad, and even courts reading the case narrowly have suggested a willingness "to extend Fourth Amendment protection . . . in the future as data

[1] Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018).
[2] *Id.*
[3] *Id.* at 1217.
[4] *Id.* at 2272 (Gorsuch, J., dissenting).
[5] *Id.* at 2233-34 (Kennedy, J., dissenting).
[6] Lauren Moxley & Shane Rogers, *Two Years of* Carpenter, INSIDE PRIV. (July 7, 2020), https://www.insideprivacy.com/uncategorized/two-years-of-carpenter; *see also* Alan Z. Rozenshtein, *Fourth Amendment Reasonableness After* Carpenter, 128 YALE L.J.F. 943, 950 (noting that lower courts have "generally cabin[ed] *Carpenter*'s cabining of the third-party doctrine").

collection through technology becomes even more pervasive."[7] More and more "non-content" is as comprehensive and invasive as CSLI, and it is possible that *Carpenter*'s third-party exception could eventually swallow the rule.

Where does that leave us? The third-party doctrine is alive today, but its life might be draining quickly. In other words, Justice Gorsuch seems to have correctly diagnosed the third-party doctrine as "on life support."[8] Courts have already limited the doctrine for content stored by third parties,[9] and *Carpenter* seems poised—in the long term—to impose the same limitations for non-content information. In this Paper I argue that the third-party doctrine is in fact on life support, and that its post-*Carpenter* life could be short given changes in technology and surveillance capabilities. I also argue that, while the third-party doctrine could apply in narrow cases going forward, courts might be well served to abandon the doctrine entirely.

This Paper proceeds in three Parts. In Part I, I analyze how *Carpenter* changes the calculus surrounding *Smith* and *Miller*. In Part II, I discuss how *Carpenter*'s broad language can have broad implications for the future (or lack thereof) of the third-party doctrine. In Part III, I conclude by assessing where we are, examining situations where the third-party doctrine might still have (limited) life, and suggesting the doctrine's abrogation.

## I. *Smith* and *Miller* After *Carpenter*

*Smith* and *Miller* announced "a categorical rule: Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it."[10] In *Miller*,

[7] Moxley & Rogers, *supra* note 6. The authors specifically cite *United States v. Cox*, 465 F. Supp. 3d 854, 858-59 (N.D. Ind. 2020), which declined to extend *Carpenter* to Facebook subscriber information but noted that "[t]he evolution of technology may one day change the analysis on this issue."

[8] *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

[9] *See* United States v. Warshak, 631 F.3d 266, 274 (6th Cir. 2010).

[10] *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting); *see* Smith v. Maryland, 442 U.S. 735, 743-44 (1979) (citing United States v. Miller, 425 U.S. 435, 442-44 (1976)) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

the Court held that the Fourth Amendment did not apply to records of account activity stored by the defendant's bank.[11] Because the defendant voluntarily conveyed the records to the bank and enjoyed "no legitimate 'expectation of privacy' in their contents," the government could subpoena the records without a warrant.[12] *Smith*, citing the same principles, held that an individual has no "legitimate expectation of privacy" regarding numbers dialed on a telephone and subsequently captured by a pen register.[13] Although courts later limited the government's ability to obtain content stored by third parties,[14] *Smith* and *Miller* served as a "bright-line rule" for non-content information pre-*Carpenter*.[15]

Whether or not the *Carpenter* Court established a "balancing test" for third-party, non-content information,[16] it is clear that *Smith* and *Miller* are no longer bright-line or categorical. Although the Court (nominally) left *Smith* and *Miller* undisturbed, it carved out a doctrinal exception by distinguishing the two cases:

> [T]he fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the *qualitatively different category* of cell-site records. . . . Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment

[11] *Miller*, 425 U.S. at 442-45.

[12] *See id.*; *cf.* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (noting that the Fourth Amendment affords protection when an individual's expectation of privacy is both subjective and "one that society is prepared to recognize as 'reasonable'").

[13] *Smith*, 442 U.S. at 742-46.

[14] *See Warshak*, 631 F.3d at 288 (distinguishing *Miller* and holding that, based on *Katz*, "[t]he government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant").

[15] *See* Orin Kerr, *Understanding the Supreme Court's* Carpenter *Decision*, LAWFARE (June 22, 2018, 1:18 PM), https://www.lawfareblog.com/understanding-supreme-courts-carpenter-decision.

[16] *See* Carpenter v. United States, 138 S. Ct. 2206, 2231 (2018) (Kennedy, J., dissenting).

> protection. . . . [W]e hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.[17]

According to the Court, you no longer automatically forfeit a "reasonable expectation of privacy" when you disclose non-content information to third parties. Instead, your expectation of privacy can vary based on the characteristics of the records or technology at issue.[18]

This change alone takes some life out of the third-party doctrine. While lower courts have continued to apply *Smith* and *Miller* to "conventional surveillance techniques and tools,"[19] it is now clear that *Smith* and *Miller* will govern in some cases and *Carpenter* in others. The fact that individuals have a reasonable expectation of privacy for CSLI but not for phone numbers or bank records raises the question of where we should draw the line—and indeed, whether a line should exist at all. If the third-party doctrine does not apply to CSLI because (1) cell phones are ubiquitous; (2) disclosure is involuntary; and (3) CSLI is revealing,[20] why should our treatment of bank records look any different?[21] Of course, it is possible to meaningfully distinguish between CSLI, bank records, and telephone numbers.[22] But the fact that the third-party doctrine requires an exception weakens the life and logic of the rule.

All of this is true even if courts read *Carpenter* narrowly. But what if *Carpenter* is actually a broad decision? As sophisticated systems come into regular use, we might imagine *Carpenter*'s

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[17] *Id.* at 2216-17 (majority opinion) (emphasis added).

[18] *See id.* at 2220 ("[T]his case is not about 'using a phone' or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence . . . .").

[19] *Id.*; *see, e.g.*, United States v. Contreras, 905 F.3d 853, 857 (5th Cir. 2018) (holding that IP addresses fall "comfortably within the scope of the third-party doctrine" even after *Carpenter*); *see also* Moxley & Rogers, *supra* note 6 (collecting recent cases).

[20] *See Carpenter*, 138 S. Ct. at 2220.

[21] In his *Miller* dissent, Justice Brennan noted that the disclosure of financial affairs to a bank "is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account." United States v. Miller, 425 U.S. 435, 451 (1976) (Brennan, J., dissenting) (quoting Burrows v. Superior Ct., 529 P.2d 590, 596 (Cal. 1974)). Brennan also noted that bank records can reveal "personal affairs, opinions, habits and associations" so as to become "a virtual current biography." *Id.*

[22] *See supra* notes 17-18 and accompanying text.

exception further eroding the rules set forth in *Smith* and *Miller*. The next Part explores this possibility, arguing that *Carpenter* reflects a changing landscape and will likely dictate the outcome of future cases.

## II. *Carpenter*'s Broad Implications

As noted above, the *Carpenter* Court repeatedly stressed the decision's narrow scope.[23] But *Carpenter*'s reasoning is broad, and it will be difficult to limit the case to its facts as a result. Indeed, the Court's discussion of CSLI might have far-reaching effects as our technological and social landscape continues to change.

The third-party doctrine is best characterized as "on life support" when viewed through this lens.[24] Much of today's "non-content" information resembles CSLI, and the "seismic shifts in digital technology" driving *Carpenter*'s exception extend well beyond location data.[25] The result is that *Carpenter* might have more long-term force than *Smith* and *Miller*, cabining the latter two cases and limiting the third-party doctrine's reach.[26] This outcome seems likely for two reasons: the growing gap between analog and digital information,[27] and the blurring lines between content and non-content.

### A. Analog Versus Digital Information

The Supreme Court has already distinguished between analog and digital information for purposes of the Fourth Amendment.[28] *Carpenter* extended this distinction to the third-party

[23] *See supra* notes 1-3 and accompanying text; *see also, e.g.*, *Carpenter*, 138 S. Ct. at 2220 n.4 ("Like Justice Gorsuch, we 'do not begin to claim all the answers today,' and therefore decide no more than the case before us." (citation omitted) (quoting *id.* at 2268 (Gorsuch, J., dissenting))).

[24] *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

[25] *Id.* at 2219 (majority opinion).

[26] Although this Part can be read independently from Part I, *Carpenter*'s expansion could more rapidly call into question the logic underlying *Smith* and *Miller*. *See supra* notes 20-22 and accompanying text.

[27] I use the term "analog" to refer to records that are narrow in scope based on practical limitations (even if stored on a computer). *See* United States v. Jones, 565 U.S. 400, 429 (2012) (Alito, J., concurring in the judgment).

[28] *See, e.g.*, Riley v. California, 573 U.S. 373, 395 (2014) (holding that the Fourth Amendment covers cell phone searches, in part because phones contain "a digital record of nearly every aspect of [people's] lives"). *Riley* emphasized

doctrine, noting the "world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information" comprising CSLI.[29] In doing so, *Carpenter* effectively ensured its broad reach: Technology has become increasingly prevalent and invasive, and *Carpenter*'s logic seems increasingly more appropriate than that of *Smith* and *Miller*.

Much of the reasoning in *Carpenter* extends beyond CSLI to other types of third-party, non-content data. CSLI is exempt from the third-party doctrine because "carrying [a cell phone] is indispensable to participation in modern society"?[30] The same can be said for content-generating interactions with Google, Amazon, and Facebook.[31] CSLI collection is involuntary because "a cell phone logs a cell-site record by dint of its operation"?[32] So too for browsing history and cookies.[33] We should afford greater protection for CSLI based on its "revealing nature"?[34] A set of Internet queries "could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of a disease, coupled with frequent visits to WebMD."[35] Even the familiar domain of *Miller*—bank records—might require reexamination.[36]

In short, *Carpenter* acknowledged that we are no longer living in the analog world of *Smith* and *Miller*. Massive digital databases and widespread Internet use might have been unforeseeable

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the difference between police scrutiny of cell phone data and the "search [of] a personal item or two in the occasional case." *Id.*

[29] *Carpenter*, 138 S. Ct. at 2220.

[30] *Id.* at 2220.

[31] *See* Kashmir Hill, *I Tried to Live Without the Tech Giants. It Was Impossible.*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/technology/blocking-the-tech-giants.html.

[32] *Carpenter*, 138 S. Ct. at 2220.

[33] *See* Daniel de Zayas, Comment, Carpenter v. United States *and the Emerging Expectation of Privacy in Data Comprehensiveness Applied To Browsing History*, 68 AM. U. L. REV. 2209, 2251-53 (2019).

[34] *Carpenter*, 138 S. Ct. at 2223.

[35] Riley v. California, 573 U.S. 373, 395-96 (2014).

[36] *See* Burt Helm, *Credit Card Companies Are Tracking Shoppers Like Never Before: Inside the Next Phase of Surveillance Capitalism*, FAST CO. (May 12, 2020), https://www.fastcompany.com/90490923/credit-card-companies-are-tracking-shoppers-like-never-before-inside-the-next-phase-of-surveillance-capitalism (describing online shopping as a "panopticon" where financial entities "track[] and analyze[] . . . purchases in near real time").

in the 1970s, but they are more or less the norm today.[37] These developments implicate concerns beyond those raised in *Smith* and *Miller*, and they place *Carpenter* at the forefront of the third-party doctrine's future.[38] This is true for location data and beyond.[39]

B. Content Versus Non-Content

*Carpenter* also recognized that the third-party doctrine's distinction between content and non-content is somewhat artificial.[40] Before *Carpenter*, location data seemed to fall squarely in the realm of non-content.[41] The *Carpenter* majority, however, took issue with this characterization. Because CSLI is "compiled every day, every moment, over several years," the Court noted that CSLI presents a detailed picture of physical location and thus "implicates privacy concerns far beyond those considered in *Smith* and *Miller*."[42] As in Part II.A, this seems to be a more accurate understanding of today's world. Content and non-content blur in large amounts, and it is possible to learn a great deal about individuals from "non-content" data.[43]

*Carpenter* seems to embrace the mosaic theory, "the idea that large-scale or long-term collections of data reveal details about individuals in ways that are qualitatively different than single instances of observation."[44] Although the theory has its critics,[45] it makes intuitive sense:

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[37] *See Carpenter*, 138 S. Ct. at 2217 ("[W]hen *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying . . . [a] comprehensive record of the person's movements.").

[38] *See* Paul Ohm, *The Broad Reach of* Carpenter v. United States, JUST SEC. (June 27, 2018), https://www.justsecurity.org/58520/broad-reach-carpenter-v-united-states ("[C]riminal defendants will test the outer boundaries of *Carpenter*'s reasoning whenever the police use massive databases . . . that reveal location information, directly or by inference. Other defendants will challenge the collection of data unrelated to location. The broad reasoning of the majority's opinion will give all of them plenty to work with.").

[39] *See id.*; *see also supra* note 7 and accompanying text.

[40] This distinction can be seen in the Stored Communications Act, which establishes different standards for obtaining content and non-content information held by third parties. *See* 18 U.S.C. § 2703. It is helpful to think of content as "substance" (e.g. phone conversations) and non-content as "metadata" (e.g. phone numbers).

[41] *United States v. Jones*, 565 U.S. 400, 412-13 (2012), raised the possibility that such data might be content. However, the Court did not reach the issue on the merits. *Id.*

[42] *Carpenter*, 138 S. Ct. at 2220.

[43] *See, e.g.*, *supra* note 35 and accompanying text.

[44] Paul Rosenzweig, *In Defense of the Mosaic Theory*, LAWFARE (Nov. 29, 2017, 3:18 PM), https://www.lawfareblog.com/defense-mosaic-theory.

[45] *See* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 314-15 (2012).

One URL in my search history does not reveal much, but a series of URLs might indicate that I am writing a paper on the third-party doctrine.[46] Given the ubiquity of trackers and the wealth of (potentially revealing) metadata held by third parties,[47] *Carpenter*'s embrace of the mosaic theory once again puts it out ahead of *Smith* and *Miller*. It is hard to draw a clear line between content and non-content, but it is easy to imagine *Carpenter*'s pragmatic approach guiding courts in subsequent "non-content" decisions.[48]

## III. Where Are We Now?

If *Carpenter* is set to cabin *Smith* and *Miller*[49]—and at the very least calls into question the logic underlying those cases[50]—what is left of the third-party doctrine? This Part aims to answer that question and assess the third-party doctrine as it currently stands. Although the third-party doctrine still has life in (at least) four scenarios, I conclude that the doctrine is anemic and courts might be better off without it.

Beginning with the four scenarios just mentioned: In what situations can the government still obtain third-party data without a warrant? First, we know that *Smith* and *Miller* are still good law. The *Carpenter* majority took care not to overturn these cases, so the third-party doctrine is still alive for bank records and telephone numbers.[51] Second, the third-party doctrine might still

[46] *Cf. Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

[47] *See* Geoffrey A. Fowler, *It's the Middle of the Night. Do You Know Who Your iPhone Is Talking To?*, WASH. POST (May 28, 2019, 5:00 AM PDT), https://www.washingtonpost.com/technology/2019/05/28/its-middle-night-do-you-know-who-your-iphone-is-talking ("In a single week, I encountered over 5,400 trackers . . . . [T]hose unwanted trackers would have spewed out 1.5 gigabytes of data over the span of a month."); *see also Jones*, 565 U.S. at 429 (Alito, J., concurring in the judgment) ("Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap.").

[48] *See, e.g.*, Commonwealth v. McCarthy, 142 N.E.3d 1090, 1104 (Mass. 2020) ("With enough cameras in enough locations, the historic location data from an [automatic license plate reader] system in Massachusetts would invade a reasonable expectation of privacy and would constitute a search for constitutional purposes.").

[49] *See supra* Part II.

[50] *See supra* Part I.

[51] *See supra* notes 1-3 and accompanying text. We also know that lower courts have read *Carpenter* narrowly, though this is subject to change. *See* Moxley & Rogers, *supra* note 6.

apply in emergencies. *Carpenter* carved out an exigency exception for CSLI, noting that warrantless searches would likely be appropriate to "pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence."[52] Third, CSLI and similar data might still be accessible in limited quantities over limited periods.[53] Finally, the third-party doctrine might still have force for "collection techniques involving foreign affairs or national security."[54]

Assuming that *Carpenter* governs future cases as described in Part II, the third-party doctrine thus has life: (1) for telephone numbers, bank records, and other narrow types of analog information; (2) in emergencies; (3) for limited data sets; and (4) in some intelligence situations. This is not much of a life, and the notion that a person "has no legitimate expectation of privacy in information he voluntarily turns over to third parties" might soon become the exception rather than the rule.[55] *Carpenter*, meanwhile, might come to protect the majority of third-party content and non-content information.[56]

Is this necessarily a bad thing? Put differently, should we be concerned that the third-party doctrine is on life support? I would argue no. As Justice Sotomayor noted in *Jones*, the third-party doctrine is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[57] Privacy groups have

[52] Carpenter v. United States, 138 S. Ct. 2206, 2222-23 (2018).

[53] *See id.* at 2217 n.3 ("[W]e need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.").

[54] *Id.* at 2220.

[55] Smith v. Maryland, 442 U.S. 735, 743-44 (1979).

[56] Even without *Warshak*, *Carpenter* seems to apply to third-party content. If CSLI implicates "legitimate privacy interest[s] in records held by a third party," emails and documents a fortiori implicate such interests. *Carpenter*, 138 S. Ct. at 2222; *see also* Katz v. United States, 389 U.S. 347, 353 (1967) (protecting the contents of a telephone conversation under the Fourth Amendment).

[57] United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

echoed this sentiment, calling the doctrine a "relic of a bygone era" and noting that individuals are "largely unaware of the volume and sensitivity of data collected about them."[58] Rather than artificially extending the third-party doctrine's life (and maintaining a jurisprudential patchwork under *Smith*, *Miller*, and *Carpenter*), we might therefore consider abrogating the doctrine and reassessing whether individuals have a "reasonable expectation of privacy" in the data they provide to third parties.[59] If the answer is yes, then for third-party content and non-content alike, "the Government's obligation is a familiar one—get a warrant."[60]

**Conclusion**

In light of the above, it is clear that the third-party doctrine is on life support. Although courts have interpreted *Carpenter* narrowly, there are indications—especially when considering new technology and surveillance techniques—that the case will have a broad reach going forward. In the future, *Carpenter* might cabin *Smith* and *Miller* or serve as a basis for ending the third-party doctrine. In the present, *Carpenter* raises issues that might lead us to question the third-party doctrine's wisdom. Ultimately, it is hard to overstate *Carpenter*'s importance to Fourth Amendment jurisprudence.[61] As the case continues to evolve beyond its facts, it will be interesting to see for how long—and whether—the third-party doctrine survives.

[58] *See* Brief of Amicus Curiae Electronic Privacy Information Center (EPIC) in Support of Defendant-Appellant at 9-10, Commonwealth v. Zachery, No. SJC-12952 (Mass. Oct. 16, 2020); *Commonwealth v. Zachery*, ELEC. PRIV. INFO. CTR., https://epic.org/amicus/massachusetts/zachery (last visited Oct. 24, 2020).

[59] *See Katz*, 389 U.S. at 360-61 (Harlan, J., concurring); *see also Jones*, 565 U.S. at 416 (Sotomayor, J., concurring). *Carpenter* might provide a good starting point for this analysis.

[60] *Carpenter*, 138 S. Ct. at 2221.

[61] *Cf.* Ohm, *supra* note 38 ("*Carpenter v. United States* is an inflection point in the history of the Fourth Amendment. . . . It will be seen as being as important as *Olmstead* and *Katz* in the overall arc of technological privacy.").

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| Date of JD/LLB | **May 17, 2023** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **NYU Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **Marden Moot Court** |

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| | |
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Sam Aaron Krevlin
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March 27, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a third-year student at New York University School of Law where I serve as an executive editor of the *NYU Law Review*. Following graduation, I will be a litigation associate at Mayer Brown. I am writing to express my interest in a clerkship for the 2024-2025 term.

In addition to working in private practice, I have a strong commitment to public service and have worked in both the executive and legislative branches of government.

This past fall, I investigated civil rights abuses within federal prisons for the Senate Permanent Subcommittee on Investigations (PSI). Following the inquiry, I drafted sections of PSI's executive report and prepared Senator Jon Ossoff for public hearings. The tactics we used during this probe informed my forthcoming Note in the *NYU Law Review* on contextualizing 21st century congressional investigations in an era of polarized politics.

Prior to my work in the Senate, I served as an extern with the U.S. Attorney's Office for the Southern District of New York where I worked on a diverse docket of civil cases including financial fraud, tort claims, and civil rights. With the Southern District, I participated in various stages of litigation from initial conference, through trial, and on appeal. I prepared depositions, drafted complaints and answers, reviewed documents, and wrote memoranda of law.

Enclosed please find my resume, transcript, and writing sample.

Under separate cover, you will find letters of recommendation from (1) Professor of Civil Rights and Legal Director for the Center for Constitutional Rights Baher Azmy, (2) Clinical Professor and Former White House Counsel Bob Bauer, (3) Clinical Professor and Chief of the Civil Rights Unit at the U.S. Attorney's Office for the Southern District of New York David Kennedy, and (4) Former Chief Counsel of PSI Dan Eisenberg.

Please feel free to contact me by email (samkrevlin@gmail.com) or phone (917-763-4123) for additional information.

Respectfully,

Sam Aaron Krevlin

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## EDUCATION

**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY
Candidate for J.D., May 2023
Honors: *NYU Law Review*, Executive Editor
Activities: Marden Moot Court, Competitor; Public Interest Law Student Association, Board Member

**NORTHWESTERN UNIVERSITY**, **MEDILL SCHOOL OF JOURNALISM**, Evanston, IL
B.S. in Journalism and B.A. in Political Science, June 2019
Honors: Commencement Speaker at Medill Graduation (Chosen by faculty)
Activities: *Daily Northwestern*, State Politics Beat Reporter

## EXPERIENCE

**MAYER BROWN**, New York, NY
***Associate***, Fall 2023; ***Summer Associate***, May – July 2022
Wrote a declaration for an Afghan woman seeking refuge from the Taliban. Drafted a motion to exclude expert testimony in a contract dispute. Updated clients on sanctions imposed against Russia by the United States.

**SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS**, Washington DC
***Law Clerk for Senator Jon Ossoff***, August – December 2022
Investigated civil rights abuses within federal prisons. Helped secure bipartisan support through political and legal negotiations. Drafted sections of an executive report on sexual abuse in federal prisons. Prepared Senator Ossoff before public hearings. Proposed two investigations for the Senator to initiate next term.

**CIVIL LITIGATION DIVISION AT U.S. ATTORNEY'S OFFICE, S.D.N.Y.**, New York, NY
***NYU Clinical Extern***, January – May 2022
Assisted for two AUSAs in both affirmative and defensive litigation by preparing depositions, writing complaints and answers, reviewing documents, and drafting memoranda of law. Prepared for oral arguments involving a request for documents from U.S. Immigration and Customs Enforcement.

**LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW**, Washington, DC
***Voting Rights Project Intern***, June – July 2021
Prepared the Committee for oral and written testimony on Texas redistricting. Wrote a memo on the application of the Purcell Principle. Advised the policy team on democratic reforms to the electoral process.

**KAMALA HARRIS FOR THE PEOPLE**, Spartanburg, SC
***Field Organizer***, July – December 2019
Built and oversaw field operations in three rural counties. Managed volunteer training, recruitment, and phonebanks. Secured endorsements from community groups, faith-based leaders, and elected officials. Recruited and led a team of eight volunteer captains who exceeded weekly goals.

**BLOOMBERG PHILANTHROPIES**, New York, NY
***Communications Intern***, June – September 2018
Created video content across education, public health, government innovation, and the arts. Curated content for the Global Business Forum, which gathers world leaders and CEOs to discuss trade policy and innovation.

**MEDILL JUSTICE PROJECT**, Evanston, IL
***Investigative Reporter***, March – September 2018
Led an investigation leading to the freedom of a wrongfully convicted man. Reviewed and analyzed court documents and police records. Conducted weekly interviews with inmate. Pursued and questioned witnesses and law enforcement officials. Co-authored a front-page story featured in the *Detroit Free Press*.

## ADDITIONAL INFORMATION

Working knowledge of Spanish. Studied abroad in Copenhagen, Denmark and Beijing, China. Marathon runner and former club tennis player.

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| **Page:** | **1 of 1** |

**New York University**
**Beginning of School of Law Record**

**Fall 2020**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Stratos N Pahis | | | |
| Torts | LAW-LW 11275 | 4.0 | B |
| Instructor: Eleanor M Fox | | | |
| Procedure | LAW-LW 11650 | 5.0 | B+ |
| Instructor: Helen Hershkoff | | | |
| Contracts | LAW-LW 11672 | 4.0 | B |
| Instructor: Kevin E Davis | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Topic: Baseball as a Road to God | | | |
| Instructor: John Sexton | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 15.5 | 15.5 |
| Cumulative | 15.5 | 15.5 |

**Spring 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Constitutional Law | LAW-LW 10598 | 4.0 | B+ |
| Instructor: Trevor W Morrison | | | |
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Stratos N Pahis | | | |
| Legislation and the Regulatory State | LAW-LW 10925 | 4.0 | B |
| Instructor: Adam B Cox | | | |
| Criminal Law | LAW-LW 11147 | 4.0 | B |
| Instructor: Avani Mehta Sood | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Instructor: John Sexton | | | |
| Financial Concepts for Lawyers | LAW-LW 12722 | 0.0 | CR |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.5 | 14.5 |
| Cumulative | 30.0 | 30.0 |

**Fall 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Civil Rights | LAW-LW 10265 | 4.0 | A- |
| Instructor: Baher A Azmy | | | |
| Corporations | LAW-LW 10644 | 5.0 | A- |
| Instructor: Robert Jackson | | | |
| Professional Responsibility and the Regulation of Lawyers | LAW-LW 11479 | 3.0 | B+ |
| Instructor: Stephen Gillers | | | |
| Orison S. Marden Moot Court Competition | LAW-LW 11554 | 1.0 | CR |
| Teaching Assistant | LAW-LW 11608 | 2.0 | CR |
| Instructor: Juan P Caballero | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 15.0 | 15.0 |
| Cumulative | 45.0 | 45.0 |

**Spring 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Evidence | LAW-LW 11607 | 4.0 | A- |
| Instructor: Daniel J Capra | | | |
| Colloquium on Law and Security | LAW-LW 11698 | 2.0 | A- |
| Instructor: Stephen Holmes<br>David M Golove<br>Rachel Anne Goldbrenner | | | |
| Government Civil Litigation Externship-Southern District | LAW-LW 11701 | 3.0 | A |
| Instructor: David Joseph Kennedy<br>Rebecca Tinio | | | |
| Government Civil Litigation Externship - Southern District Seminar | LAW-LW 11895 | 2.0 | A- |
| Instructor: David Joseph Kennedy<br>Rebecca Tinio | | | |
| The Elements of Criminal Justice Seminar | LAW-LW 12632 | 2.0 | B+ |
| Instructor: Preet Bharara | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 13.0 | 13.0 |
| Cumulative | 58.0 | 58.0 |

**Fall 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Legislative and Regulatory Process Clinic | LAW-LW 12230 | 8.0 | A |
| Instructor: Sally Katzen Dyk<br>Robert Bauer | | | |
| Legislative and Regulatory Process Clinic Seminar | LAW-LW 12231 | 6.0 | IP |
| Instructor: Sally Katzen Dyk<br>Robert Bauer | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.0 | 8.0 |
| Cumulative | 72.0 | 66.0 |

**Spring 2023**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Sports Law | LAW-LW 10585 | 3.0 | *** |
| Instructor: Jodi Saposnick Balsam | | | |
| Law Review | LAW-LW 11187 | 2.0 | *** |
| Federal Courts and the Federal System | LAW-LW 11722 | 4.0 | *** |
| Instructor: Helen Hershkoff | | | |
| Property | LAW-LW 11783 | 4.0 | *** |
| Instructor: Katrina M Wyman | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 13.0 | 0.0 |
| Cumulative | 85.0 | 66.0 |

Staff Editor - Law Review 2021-2022

**End of School of Law Record**

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VIVAKE PRASAD
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March 20, 2023

Your Honor:

It is my pleasure to write in high recommendation of Sam Krevlin for a clerkship in your chambers. I supervised Sam while he served as a full-time law clerk for the U.S. Senate Permanent Subcommittee on Investigations ("PSI"), the primary investigative body of the U.S. Senate, during his first semester of 2L. At the time, I was the Deputy Staff Director & Senior Counsel; I have since returned to private practice in New York. Sam was our best law clerk during my nearly two years with PSI. He is a skilled writer with an impressive work ethic, fidelity to sound logic, and great judgment. His emotional intelligence, maturity, and curiosity set him apart from the many talented law students out there.

Our mandate at PSI was to conceive of and execute bipartisan civil rights-oriented investigations that held corrupt or negligent leaders to account and established a factual predicate for reforms. We did this by interviewing witnesses, requesting and analyzing non-public information from federal agencies and private companies, issuing bipartisan reports with findings, and holding Congressional hearings. This work was difficult. We had to find that sliver of the Venn diagram overlap between how we, in the Majority, understood the facts we uncovered and how our counterparts in the Minority did. We had no one to adjudicate what were essentially discovery disputes, and were left to our own devices to find creative ways of exerting pressure on federal agencies and creating our record. We had a shoestring budget. For most of my months-long investigations, it was just me and a junior attorney.

Sam dove in from the get-go. He brought enthusiasm and intensity to his work, quickly learning the rhythm of Congressional investigations. He came in early and stayed late, found ways to be helpful, and did more than what he was asked. I recall numerous instances—particularly for our investigation into the sexual abuse of female prisoners in Federal Bureau of Prisons facilities—where he conducted quick and thorough legal research into matters of Constitutional law, drafted memoranda that efficiently identified the crux of the issues, identified new investigative leads, and drafted sections of our bipartisan report ultimately published in conjunction with our December 2022 hearing featuring survivors of abuse, the Inspector General for the Department of Justice, and the Director of the Federal Bureau of Prisons. When it came to review sensitive documents *in camera* at the Department of Justice on the morning of the

Thanksgiving holiday, Sam was with us. When my analysis rested on a faulty premise, Sam told me so, respectfully, of course. It was invaluable to have a partner like Sam in the trenches with me. His motor, good attitude, and dedication were invaluable.

One of Sam's greatest strengths is the ability to see the big picture, situating his work in the scheme of institutional interactions between the legislative and executive branches or some broader legal or political strategy. This allows him to add value on his own initiative. For example, after learning our criteria for a viable investigation, he proposed a new one that, at least by the time I left the Senate, had been set into motion. I am not aware of any other law clerk-directed investigation.

Thinking back to my own time as a law clerk for a District Judge in the Southern District of New York, I have every confidence that Sam would thrive in this role. I recommend him without reservation. Please do not hesitate to contact me should you wish to discuss these matters. I would be glad for the chance to sing Sam's praises.

Respectfully submitted,

Dan Eisenberg
(212) 763-5003

**New York University**
*A private university in the public service*

School of Law

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**Bob Bauer**
*Distinguished Scholar in Residence and Senior Lecturer*
*Co-Director of the Legislative and Regulatory Process Clinic*

March 8, 2023

**RE: Sam Krevlin, NYU Law '23**

Your Honor:

I am a member of the faculty at the New York University School of Law, and I am very pleased to recommend one of my students, Sam Krevlin, for a clerkship in your chambers.

Sam was an outstanding student in the Fall 2022 Legislative and Regulatory Process Clinic, which I co-direct along with Professor Sally Katzen. The semester offers students, admitted on application, an opportunity to learn through full-time externships about the various roles of lawyers in advising on, supporting and influencing the policymaking process in the federal government. We work with them in an academic setting in three-hour weekly seminars and, through ongoing contact with their workplace supervisors, monitor their performance in their lawyering support roles. At the end of the semester, the students submit a 20 to 25 page paper on an approved topic.

Sam excelled. He was accepted into a position on the U.S. Senate's Permanent Subcommittee on Investigations, chaired by Senator Jon Ossoff of Georgia. The office had the highest praise for the quality of his work. The clinical experience is intensive, requiring students to support the office as they would if they were permanent staff, and Sam was credited with making significant contributions. These included his recommendations at the end of his externship for potential areas for investigative focus in the next session. His work earned him an "A" for this graded element of the clinic.

In class, Sam was also a top performer. At the time of this writing, Sam and the other students are just submitting the final versions of their papers. However, I can certainly say that based upon the draft and his class contributions, he will do exceedingly well in his graded academic work.

Sam is thoughtful, careful in the framing of questions and comments, curious, and probing in exploring all sides of an issue. We always look for a student's capacity to listen carefully to the views of others and to respond constructively. Sam was a delightful and stimulating participant in our discussions.

For all of these reasons, I can unreservedly recommend Sam for a clerkship, and I would be pleased to answer any questions you have or provide any other information helpful to your consideration of Sam’s clerkship candidacy.

Respectfully,

Robert F. Bauer

centerforconstitutionalrights

March 16, 2023

**RE: Sam Krevlin, NYU Law '23**

Your Honor:

I am the Legal Director of the Center for Constitutional Rights (CCR), a national impact litigation and advocacy organization, where I supervise work related to racial justice, prisoners' rights, immigrants' rights, LGBTQI+ rights, and rights of Guantanamo detainees and victims of torture. Prior to this position, I was a tenured law professor at Seton Hall Law School, where I taught Constitutional Law for ten years and directed a Constitutional Law Clinic. Currently, I am an Adjunct Professor at NYU and Yale Law Schools, where I teach an intensive course on Civil Rights Law.

I am writing to support the application of Sam Krevlin for a clerkship in your chambers. Sam was a student in an intensive four-credit Civil Rights Law course I taught at NYU in the Fall 2021 –covering theory and practice of Section 1983, *Bivens*, immunities and defenses for state, municipal and federal actors, modes of liability under *Monell*, other Reconstruction-era civil rights statutes (1981, 1982, 1985(3)), standing and damages (all of which would be an important knowledge base for a clerkship). Throughout the semester in class, Sam revealed himself to be quick and fluid in discussing complex doctrinal materials and had a positive ability to see connections among doctrinal threads we studied weeks or months apart. When on call, he presented the material with lucidity, reflection and careful recall. He has a thoughtful communication style that seems to reflect self-awareness, maturity and an appropriate balance between rigorous attention to detail and interest in political-legal context. I reviewed his exam which was excellent, even by NYU standards: clear, unlabored writing and analysis.

Sam brings a deep passion for the possibility of law to drive positive social change and presents himself with humility about learning legal doctrine and legal strategy. I was consistently impressed with the curiosity behind his questions – that came for a genuine thirst for understanding and appreciation of nuance.

On an interpersonal level, he is kind, mature and collegial. I believe he would make a productive and positive contribution to your chambers and urge you to give him consideration.

Very truly yours,

*/s/ Baher Azmy*

Baher Azmy

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**U.S. Department of Justice**

*United States Attorney*
*Southern District of New York*

*86 Chambers Street, 3rd Floor*
*New York, NY 10007*

February 21, 2023

Re: *Recommendation of Sam Krevlin*

Dear Judge:

I am writing to recommend Sam Krevlin for a clerkship in your Chambers. Sam interned with Assistant United States Attorneys in our Civil Division during the Spring 2022 semester as part of New York University Law School's Government Civil Litigation Clinic. I co-teach the class, which meets for two hours a week for classroom discussion, and keep apprised of the approximately twelve to fifteen hours of work per week done by the interns with their assigned AUSAs. Prior to becoming an Assistant United States Attorney in 2000, I clerked for the Hon. Kimba M. Wood of the Southern District of New York, and the Hon. Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit. Based on my own years as a law clerk, my classroom experience with Sam, and my discussions of him with the AUSAs for whom he worked, I believe that Sam would make an excellent law clerk.

Sam is smart, perceptive, and hard-working. As a budding litigator, Sam sees things pragmatically, and presents legal arguments in a down-to-earth manner. In reviewing Sam's law school transcript, it is striking that his strongest performance came when his coursework transitioned away from doctrinal classes and toward more practical work. Sam's best performances in the clinic came when he was able to present orally, as Sam demonstrates a solid grasp of the facts and law and speaks fluidly and confidently. In particular, he gave a compelling mock opening in a False Claims Act case involving Medicaid/Medicare fraud by a major pharmaceutical company, the most difficult of the opening argument assignments that we give to students, on account of the complexity of the case, the vast amount of information that needs to be synthesized into a brief, ten-minute presentation, and the fact that the conduct of his client at first seems to be completely unsympathetic. For the writing assignment in the class, a mock reply brief to a summary judgment motion, Sam's work was pithy, sharp, effective, and persuasive — most of the criticisms that my co-teacher and I had on his paper related to matters of form that students frequently encounter when writing a reply brief for the first time, specifically that preliminary statements on reply should be very short, and a statement of facts is generally unnecessary. These issues can be readily addressed, but the acuity and fluidity that Sam displays in his written work are much harder to learn.

In addition to the seminar, Sam was assigned to work with two AUSAs. One aspect of the clinic that challenges law students is that AUSAs are typically working on numerous complex matters simultaneously. To keep on top of the work, an intern must be able to address questions as they arise under very different statutes and involving wildly disparate facts, all while keeping

two different supervisors operating under tight deadlines happy. Sam's AUSA supervisors characterized him as "fantastic" and "my favorite intern yet," based upon his engagement with the work of the Office, his eagerness to take on assignments and attend court conferences and depositions, his rapid turnaround on projects, and his conscientiousness in checking in to obtain additional assignments. In addition, after the seminar concluded, Sam went to work for the Senate Permanent Subcommittee on Investigations in Washington, D.C. where, it turns out, he happened to work for a period of time with a former AUSA from this Office. That former AUSA, who was one of the toughest critics of interns that I assigned him while he was in the Office, advised me that he was also favorably impressed with Sam in the time that they worked together.

For all of these reasons, I strongly recommend Sam as a law clerk. Please do not hesitate to contact me at the number below if you have any further questions.

Sincerely,

\s\ David J. Kennedy

David J. Kennedy
Assistant United States Attorney
Tel. No. (212) 637-2733
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*Note: This writing sample was submitted for a class in conjunction with the Civil Division at the U.S. Attorney's Office for the Southern District of New York. I was assigned to write a reply to the Government's motion for summary judgement. The writing sample incorporates feedback from the professors of the seminar by addressing the collateral estoppel and res judicata arguments first and combining those arguments into one section.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
ROBERT CARVAJAL,

Plaintiff,

- against –

HUGH DUNLEAVY, in his Individual and Official Capacities, DON MIHALEK, in his Individual and Official Capacities, TIMOTHY RAYMOND, in his Individual and Official Capacities, TOM RIZZO, in his Individual Capacity, DANIEL HUGHES, in his Individual Capacity, TREVA LAWRENCE, in his Individual Capacity, JOHN TANI, in his Individual Capacity, and DON McGEE, in his Individual Capacity,

Defendants.
----------X

REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THE LAW OFFICE OF SAM KREVLIN
40 WASHINGTON SQ
NEW YORK, NY 10012
Telephone: (917) 763-4123

**TABLE OF CONTENTS**

*PRELIMINARY STATEMENT* ..... *1*

*STATEMENT OF FACTS* ..... *3*

*ARGUMENT* ..... *3*

I. THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA DO NOT APPLY IN THIS CASE..... 4

II. THE SECRET SERVICE AGENTS ARE NOT ENTITLED TO QUALFIED IMMUNITY..... 6

III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.... 8

*CONCLUSION*..... *10*

## TABLE OF AUTHORITIES

**CASES** **PAGE(S)**

Angelastro v. Prudential-Bache Securities, Inc.,
764 F.2d 939 (3d Cir. 1985) ..... 9

United States v. Banks,
540 US 31 (2003) ..... 4

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,
403 U.S. 388 (1971) ..... 1

Consarc Corp. v. Marine Midland Bank,
996 F.2d 568 (2d Cir. 1993) ..... 8

County of Sacramento v. Lewis,
523 U.S. 833 (1998) ..... 6

Federated Dep't Stores, Inc. v. Moitie,
452 U.S. 394 (1981) ..... 5

Grieve v. Tamerin,
269 F.3d 149 (2d Cir. 2001) ..... 5

Hope v. Pelzer,
536 U.S. 730 (2002) ..... 2, 7

Hunter v. Bryant,
502 U.S. 224 (1991) ..... 6

Lennon v. Miller,
66 F.3d 416 (2d Cir. 1995) ..... 6

Mullenix v. Luna,
577 U.S. 7 (2015) ..... 8

Tennessee v. Garner,
471 U.S. 1 (1985) ..... 8

Thompson v. Hubbard,
257 F.3d 896 (8th Cir. 2001) ..... 7

Waldman v. Village of Kiryas Joel,
207 F.3d 105 (2d Cir. 2000) ..... 6

Weinmann v. McClone,
138 F. Supp 3d. 1043 (E.D. Wis. 2015) ..... 5

Plaintiff respectfully submits this reply memorandum of law in opposition to the Government's motion for summary judgment.

## PRELIMINARY STATEMENT

Robert Carvajal ("Plaintiff") is a victim of a botched and ill-prepared raid in which Secret Service Agents ("Agents") resorted to deadly and unjustifiable force only seconds after entering the apartment front door. The Agents shot at Mr. Carvajal knowing persons unaffiliated with a money laundering operation may have resided in the home. Because of Defendants' deliberate indifference to Mr. Carvajal's life, he may never obtain the physical or mental strength to engage in the same forms of employment or recreational activity as he once did.

Mr. Carvajal brought this action against the Agents in their individual capacities under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Despite the strength of Mr. Carvajal's claim, the Government has taken the unusual step of moving for summary judgment before discovery has commenced. To grant the motion before any discovery would allow the blatant use of excessive and unjustifiable force to stand without any repercussions. Granting summary judgment is especially unwarranted, premature, and contrary to our system of justice because genuine issues of material fact remain.

Although every material fact is in dispute, the Government makes three arguments in its motion for summary judgement: (1) under the doctrine of collateral estoppel; (2) under the doctrine of *res judicata*; and (3) under the doctrine of qualified immunity.

The collateral estoppel and *res judicata* arguments fail because the amount of force used by Defendants in executing the warrant was never at issue when parties litigated a motion to suppress evidence. Thus, certain issues raised by Plaintiff in this action have never before been

litigated. Testimony on force given at earlier proceedings paint an incomplete picture of the day's events.

Lastly, the qualified immunity argument also fails because Defendants' use of deadly force was clearly excessive. No reasonable factfinder could conclude that Defendants were acting reasonably under the circumstances and "[t]he obvious cruelty inherent in [Defendants' actions] should have provided some notice that their alleged conduct" was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 745 (2002).

## STATEMENT OF FACTS

Plaintiff Robert Carvajal received three gun-shot wounds and nearly died at the hands of Secret Service Agents. Guns drawn with a "shoot first, think later" approach to policing, Secret Service Agents thought little of Fourth Amendment protections when they charged through the door with a battering ram at 6:00 AM on February 9, 2004. To make matters worse, Secret Service Agents were never authorized to arrest Mr. Carvajal. Rather, the arrest warrant was for Joseph Carvajal, the brother of Mr. Carvajal. (Hr. 108).

Since late 2003, the Secret Service had been investigating Joseph Carvajal for counterfeiting currency and narcotics distribution. (Trial Tr. at 225-26, 280-81). With the help of Mark Crump, a confidential informant who was promised leniency in return for information, the Secret Service began to surveil Joseph Carvajal's activity through telephone conversations and in-person meetings. (Id). Throughout the investigation, the Secret Service only encountered Mr. Carvajal one time and no illegal activity occurred. (Trial Tr. at 233). Prior to the raid, Mr. Carvajal had no criminal history. (Compl. at 3).

At 6:00 AM on February 9, 2004, the Agents bulldozed through the front door of Joseph Carvajal's apartment. Upon hearing the battering ram, Mr. Carvajal woke up and walked towards the front door. Then, without any warning from the Agents, Mr. Carvajal was shot and dropped immediately to the floor. After falling to the ground, a second shot was fired.

Agent Mihalek testified that there were "two individuals in the back of the apartment, one individual in front holding a gun, the other individual in the back holding a large object. They moved from my right to my left to where the first two agents were headed into the kitchen-dining room area." (Tr. 252). Mihalek testified that he shot Mr. Carvajal as he headed towards the kitchen to discard both a gun and printer through an open window. (Tr. 253).

The evidence does not corroborate Mihalek's version of events. Agents outside the building observed a gun and printer fall nine seconds after the first shot was fired. (Tr. 334). Thus, according to the Government's version of events, Mr. Carvajal (after suffering multiple bullet wounds) had the physical fortitude to walk across the apartment, throw two heavy objects out of a window, and return to where he was treated by police.

Mr. Carvajal is alive after being shot multiple times but still suffers permanent physical and emotional injuries.

## ARGUMENT

### I. THE DOCTRINES OF COLLATERAL ESTOPPEL AND *RES JUDICATA* DO NOT APPLY IN THIS CASE

The Government argues that Plaintiff is collaterally estopped from litigating certain issues in this case because those issues were supposedly litigated in a motion to suppress evidence. This argument fails because the issues decided in that case have no bearing on the current one. The Government cites Judge Hellerstein's finding that the search complied with the Fourth Amendment because the Agents had a "reasonable suspicion of exigent circumstances" given the fact that they were searching for easily disposable items. See United States v. Banks, 540 U.S. 31 (2003); Hearing Tr. at 97-98, 109-10.

However, the suppression hearing pertained to the items recovered as a result of the executed search warrant. The trial court judge only made determinations on the validity of the search warrant and seizure of the items. Judge Hellerstein did not decide or even evaluate the issue of excessive force.

The Government mischaracterizes the earlier hearing. If anything, Judge Hellerstein was sympathetic towards Mr. Carvajal's claim of excessive force. The Judge found that excessive

force likely existed but did not make a final ruling on the issue because it was not the proper forum to do so.

Judge Hellerstein said that

> "[i]f there's any impropriety with regard to the firing of the weapons, then maybe it's the subject of a different proceedings [sic], but they're not grounds to suppress anything that was seized. And in the context of the entry, a lot more information would have to be presented in relationship to that which the officers considered reasonable in the circumstance in terms of their reasonable fears and their reasonable cautions." (Hr. 108-9)

Judge Hellerstein's opinion aligns with Mr. Carvajal's belief that excessive force has yet to be litigated and the prior hearing was not the proper venue to make such a claim. Other courts agree with Judge Hellerstein's assessment. See e.g., Weinmann v. McClone, 138 F. Supp 3d. 1043, 1046 (E.D. Wis. 2015) (holding that excessive force was not actually litigated in a motion to suppress on the reasonableness of entering a garage without a warrant).

The purpose of collateral estoppel is to ensure that parties do not relitigate legal or factual issues in a second proceeding when the issue was already "actually litigated" and "actually decided." Because Judge Hellerstein specifically acknowledged that the issue of excessive force was not "actually decided," the Government's claim is without merit. Grieve v. Tamerin, 269 F.3d 149, 153 (2d Cir. 2001).

The question of *res judicata* is whether the litigant had the opportunity to obtain review of a contested issue in the earlier proceeding. See, e.g., Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

The Government faults Mr. Carvajal because he did not raise excessive force claims in his underlying criminal proceeding. They claim it should have been raised because excessive

force arises from the same "nucleus of operative fact." Waldman v. Village of Kiryas Joel, 207 F.3d 105, 108 (2d Cir. 2000).

The same argument that applies to collateral estoppel applies to *res judicata*. Excessive force was not decided in the earlier proceeding. Furthermore, Mr. Carvajal raised the issue of excessive force as it related to the seizure of items in the earlier proceeding. (Hr. 108). Ultimately, as implied in Judge Hellerstein's opinion, now is the proper time to review the claim of excessive force.

## II. THE SECRET SERVICE AGENTS ARE NOT ENTITLED TO QUALFIED IMMUNITY

The Second Circuit has held that to defeat a defense of qualified immunity, a plaintiff must demonstrate that "no reasonable officer would have made the same choice." Lennon v. Miller, 66 F.3d 416, 426 (2d Cir. 1995). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Hunter v. Bryant, 502 U.S. 224, 229 (1991).

However, "when an officer is alleged to have engaged in behavior [that] is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," that officer may not benefit from the qualified immunity defense. County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998). In this case, "[t]he obvious cruelty inherent in this practice should have provided [Defendants] with some notice that their alleged conduct" was unconstitutional. Hope, 536 U.S. at 745.

The Government's actions were so egregious and unwarranted because the Agents shot Carvajal multiple times just seconds after entering the apartment. The Government's account that

Mr. Carvajal was headed to an open window in the kitchen is no justification for the shooting. Mr. Carvajal would not have posed a threat to the Agents since he was moving away from the shooter. Furthermore, Mr. Carvajal vehemently denies holding any weapon during the raid. Given these key disputes, this case must proceed to trial before a factfinder.

The Government contends that it was reasonable for officers to shoot seconds after invading the home because "they came to the apartment fully aware that Joseph had a lengthy criminal history involving firearms." *See* Brief for Defendant for Summary Judgement at 20, Carvajal v. Dunleavy, 1:07-cv-00170-PAC (S.D.N.Y. July 6, 2007). It is clear that the officers are trying to escape liability through Plaintiff's association with his brother. If this line of reasoning were to be accepted, then it would be difficult for any person living with a formerly incarcerated person to seek justice for an unjustified act of excessive force. Lives would be jeopardized through sanctioning a "shoot first" practice whenever a raid involves a person with a history of firearm charges.

The Government also completely mischaracterizes Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001) (granting an officer qualified immunity after incorrectly believing a victim was armed). Police officers in Thompson were responding to a report of shots fired and two suspects fleeing on foot from the scene of an armed robbery. In Thompson, police were responding to an active shooting and Thompson fit the description of the robbery suspect. In this case, Defendants were the first and only ones to use deadly force. The decision to grant qualified immunity is highly fact specific. It was unreasonable in the present case for officers to disregard their training and shoot before identifying the target when they knew that multiple people lived in the home. See Mullenix v. Luna, 577 U.S. 7 (2015) (Sotomayor, J., dissenting) (criticizing the police officers who shot at a fleeing car when instructed to "stand by").

The Government's citation to Tennessee v. Garner is equally off base. 471 U.S. 1 (1985). The Court in Tennessee held that force may be used if "it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. at 3. However, in the present case, police targeted Mr. Carvajal without assessing whether he posed a threat during flight. Mr. Carvajal was shot only seconds after the Agents barged through the front door. Based on the record, Mr. Carvajal would not have posed a threat to the officers as his back would be facing away from them while trying to discard an "object." Furthermore, it is unlikely that Mr. Carvajal was "escaping," as jumping out of the window would have led to death or bodily harm. It was unreasonable for officers to believe Mr. Carvajal posed a significant threat and the possibility that he would attack the Agents is completely unjustified.

Ultimately, the Government's brief fails to even address the adequacy of Mr. Carvajal's claims of excessive force. It hides behind the doctrine of qualified immunity only to come up short because of how egregious the Agents acted in almost killing Mr. Carvajal.

## III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

On a motion for summary judgment, the moving party bears the burden of establishing that there are no genuine issues of material fact in dispute. See, e.g., Consarc Corp v. Marine Midland Bank, 996 F.2d at 572 (2d Cir. 1993).

Almost every significant fact pertaining to Mr. Carvajal's near death experience is in dispute. Even the fact that Mr. Carvajal held a gun before being shot is in dispute. Mr. Carvajal denies ever possessing a gun during the raid. At this stage in the litigation, the Court must accept Plaintiff's version of the facts as true. See Angelastro v. Prudential-Bache Securities, Inc., 764

F.2d 939, 944 (3d Cir. 1985). Given the genuine dispute over the critical question of whether Mr. Carvajal was armed at the time of the shooting, summary judgment is wholly inappropriate.

Whether Carvajal possessed a gun is not the only issue in dispute. Mr. Carvajal disputes the adequacy of the training that Agents received prior to the raid; he disputes how many times the Agents knocked on the front door; he disputes the announcement of their presence; and he disputes that the recovered gun fell from apartment 6D. Furthermore, the Government and Mr. Carvajal dispute where the shooting occurred. This is significant because Mr. Carvajal could have been deemed a threat if he had been moving towards law enforcement.

This case not only turns on material facts that are in dispute, but the evidence recovered from the crime scene suggests that Mr. Carvajal's account of events is the most accurate.

Mihalek claims that he saw Mr. Carvajal and his brother standing in the hallway outside of the bedroom and then move towards the kitchen. Agent Mihalek claims to have shot Mr. Carvajal as he headed towards the Agents in the kitchen. (Tr. 253). However, based on the layout of the apartment, these facts are heavily disputed. The layout suggests that Mr. Carvajal did not approach the kitchen window to discard an object. This is because Mr. Carvajal would not have been able to enter the kitchen without running into Mihalek. (Tr. 251).

Furthermore, Mr. Carvajal was found on the floor bleeding in a location that does not fit Mihalek's description of events. (Tr. 251). The Agents assert that Mr. Carvajal threw objects out of the kitchen window of 6D. Mr. Carvajal disputes possessing a weapon and discarding that weapon through the kitchen window. The facts verify Mr. Carvajal's version of events. It is unlikely that he would have had the strength to walk seven feet, throw objects out the window, and return to the location where he was found bleeding from gunshot wounds. Agents outside the

apartment building did not see whether the objects fell from apartment 6D or 16D, whose occupants were also part of the money laundering scheme.

Because there are genuine disputes regarding basic facts critical to this case, the Court cannot grant summary judgment to Defendants.

## CONCLUSION

For the foregoing reasons, the Court should deny the Government's motion for summary judgment.

Dated: New York, New York
March 23, 2022

Respectfully submitted,
Sam Krevlin
THE LAW OFFICE OF SAM KREVLIN
40 WASHINGTON SQ
NEW YORK, NY 10012

## Applicant Details

| | |
|---|---|
| First Name | **Margaret** |
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## Applicant Education

| | |
|---|---|
| BA/BS From | **Gonzaga University** |
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| JD/LLB From | **Duke University School of Law**<br>**https://law.duke.edu/career/** |
| Date of JD/LLB | **May 1, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Duke Journal of Constitutional Law & Public Policy** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | |

## Bar Admission

## Prior Judicial Experience

| | |
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| Judicial Internships/ Externships | **No** |
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## Specialized Work Experience

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Margaret Kruzner
510 E. Pettigrew St., Apt. 542
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June 11, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to apply for a clerkship for the 2024–25 term. I am a second-year student at Duke Law School. I expect to receive my J.D. in May of 2024 and will be available to begin work any time after that date. I am keenly interested in evidence and civil procedure and am thrilled at the opportunity to work in a United States District Court, especially in one as active as the Eastern District of Virginia. Additionally, I hope to learn from your experience as an Assistant United States Attorney, as I hope to have a career in government litigation in the future.

My research, writing, and editing experiences will make me a successful law clerk. Last semester, I enhanced my writing skills in the course Appellate Practice, where I produced an eight-thousand-word appellate brief under the instruction of North Carolina Solicitor General Ryan Park. I also serve as the Managing Editor of *Duke Journal of Constitutional Law and Public Policy*. In the position, I have strengthened my editing skills and my ability to manage large projects with a team. I also published a forty-page commentary analyzing the potential outcomes in the *Students for Fair Admissions* litigation before the Supreme Court.

I thrive in a fast-paced courtroom environment. Prior to attending law school, I worked at the Spokane County Prosecutor's Office, where I assisted prosecutors on complicated cases involving co-defendants and child victims. I built on my trial experience last summer at Legal Aid of North Carolina, where I drafted complaints for over fifty domestic violence clients, argued successful evidentiary motions, and even advocated for a consent decree with my Student Bar License. These experiences form my perception of the law: that it should protect the most vulnerable in a predictable manner. As your clerk, I will value the role of precedent faithfully and be mindful of the real-world impact of your rulings and orders.

Enclosed are copies of my resume, Duke Law transcript, writing sample, and letters of recommendation from Professors Emilie Aguirre, Stuart Benjamin, and H. Jefferson Powell. Please contact me if you need any additional information. Thank you for your consideration.

Sincerely,

Margaret Kruzner

**MARGARET KRUZNER**
Durham, NC | margaret.kruzner@duke.edu | (206) 910-7554

## EDUCATION

**Duke University School of Law**, Durham, NC
*Juris Doctor*, expected May 2024
GPA: 3.62
*Honors:* C. Wells Hall Scholarship Recipient
Public Interest and Public Service Law Certificate Candidate
Twiggs-Beskind Cup, Outstanding Mock Trial Competitor
*Activities:* Moot Court Board, *President*
Duke Journal of Constitutional Law and Public Policy, *Managing Editor*
Mock Trial Board, *Member*
Duke Bar Association, *3L Representative, Internal Vice President*
The Clemency Project, *Pro Bono Volunteer*

**Gonzaga University**, Spokane, WA
Bachelor of Arts in Criminal Justice and Political Science, *summa cum laude*, May 2021
GPA: 3.96
*Honors:* Dr. Georgie Ann Weatherby Leadership Award
Outstanding Mock Trial Attorney, Awarded by the American Mock Trial Association, Yale University, the University of Oregon, and others.
*Pi Sigma Alpha*—National Political Science Honors Society, *Member*
*Alpha Sigma Nu*—Honor Society of Jesuit Universities, *Member*
*Activities:* Mock Trial, *President* (2019–20), *Tournament Coordinator* (2018–19)

## EXPERIENCE

**Kirkland & Ellis LLP**, Washington, DC
*Summer Associate*, May 2023 – Jul. 2023

- Drafted supplemental memorandum in support of motion for vacatur.
- Conducted statutory research and outlined preliminary briefing on novel state statute.
- Created internal memoranda on standing, sufficiency of pleadings, and abstention.

**Legal Aid of North Carolina**, Durham, NC
*Domestic Violence Unit Intern*, May 2022 – Jul. 2022

- Represented four clients with the North Carolina Bar Student Practice Certification.
- Conducted client interviews and organized intake evidence for four staff attorneys.
- Drafted amended complaints and motions for over fifty litigants.
- Negotiated a successful consent order between a client and a represented defendant.
- Argued a successful motion for order compelling discovery.

**Spokane County Prosecutor's Office**, Spokane, WA
*Victim/Witness Unit Intern, Trial Intern*, Jun. 2019 – Sep. 2019

- Synthesized victim and witness statements into summary reports for over twenty prosecutors across the major crimes, gangs, and domestic violence units.
- Organized evidence in three co-defendant trials for prosecutors in the major crimes unit.

## ADDITIONAL INFORMATION

First Generation Law Student. German Speaker. Seattle Mariners Superfan. Puzzle Enthusiast. Academic Interests in Administrative Law and Civil Procedure. Published in *DJCLPP Sidebar*.

**MARGARET KRUZNER**

510 Pettigrew. St., Apt. 542
Durham, NC 27708

(206) 910-7554
margaret.kruzner@duke.edu

4435 28th Ave W
Seattle, WA 98199

# UNOFFICIAL TRANSCRIPT
# DUKE UNIVERSITY SCHOOL OF LAW

## 2021 FALL TERM

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Civil Procedure | Levy, M. | 3.7 | 4.50 |
| Criminal Law | Coleman, J. | 3.3 | 4.50 |
| Torts | Guttel, E. | 3.3 | 4.50 |
| Legal Analysis, Research, Writing | Hanson, M. | *Credit Only* | 0.00 |

## 2022 SPRING TERM

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Constitutional Law | Powell, J. | 4.1 | 4.50 |
| Contracts | Aguirre, E. | 4.0 | 4.50 |
| Administrative Law | Benjamin, S. | 3.7 | 3.00 |
| Legal Analysis, Research, Writing | Hanson, M. | 3.4 | 4.00 |

## 2022 SUMMER TERM

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| J.D. Professional Development | N/A | *Pass* | 0.00 |

## 2022 FALL TERM

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Property | Foster, A. | 3.5 | 4.00 |
| Corporate Crime | Buell, S. | 3.6 | 4.00 |
| Appellate Practice | Park, R. | 3.6 | 3.00 |
| Ethics | Martinez, V. | 3.5 | 3.00 |

## 2023 WINTER TERM

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| U.S. Civil/Military Relations | Dunlap, C. | *Credit Only* | 0.50 |
| Mindfulness for Law Students | Raker, K. | *Credit Only* | 0.50 |

**2023 SPRING TERM**

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Federal Courts | Young, E. | 3.5 | 5.00 |
| Civil Rights Litigation | Miller, D. | 3.6 | 3.00 |
| Evidence | Stansbury, S. | 3.9 | 3.00 |
| Privacy Law & Policy | Dellinger, J. | 3.8 | 3.00 |

**2023 SUMMER TERM**

| COURSE TITLE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| J.D. Professional Development | N/A | *Pass* | 0.00 |

TOTAL CREDITS: 58.50
CUMULATIVE GPA: 3.62

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Margaret Kruzner

Dear Judge Walker:

Margaret Kruzner has asked me to write you in support of her application for a clerkship. I am delighted to do so. Ms. Kruzner was an excellent classroom participant in the constitutional law class she took with me in her 1L year, and she wrote a spectacularly good exam. I am certain she would be an outstanding clerk.

In the spring semester 2022, I had ninety-six students in Constitutional Law I. The great majority of class meetings in that course involve students arguing different sides of a case or issue, so that at any given time the student who has the floor is responding not only to my questions, but also to classmates' arguments. Given the size of the class that spring, I assigned each student a single assignment for which he or she had primary responsibility. As is almost always true (regardless of class size), there were numerous opportunities for students to answer questions stumping the day's presenter and contribute to the discussion in other ways. Ms. Kruzner was an active and outstanding participant in the classroom. She was well-prepared and adept on her day as presenter, and frequently helped out in insightful ways on other days when classmates were having difficulty.

Despite the importance of the classroom work, the final grade in Constitutional Law I is based primarily on the final examination, which I blind grade, and only after those scores are set do I learn the students' identities. Ms. Kruzner's answers, both in the fact pattern/legal problem part of the exam, and in the thematic essay that is the final question, were truly remarkable. I make sparing use of Duke's above 4.0 grading option, but it was obvious to me that she had earned such a grade.

I don't know Margaret Kruzner outside the context of class and office hours, but my sense is that she is an engaging person with whom it would be a pleasure to work. I do know that she is tremendously excited about becoming a litigator, and her resume proves that she is energetic and involved in law school. I recommend her to you with the greatest enthusiasm.

If it would be helpful in your consideration of Ms. Kruzner's application, I would be very glad to speak with you or someone else in your chambers.

Respectfully yours,

H. Jefferson Powell
Professor of Law

Jeff Powell - POWELL@law.duke.edu - 202-994-4691

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Margaret Kruzner

Dear Judge Walker:

I write to give my wholehearted recommendation for Margaret Kruzner's clerkship application. Margaret will make a fantastic clerk: she is brilliant and diligent, deeply thoughtful, and impressively articulate. She is also a wonderful person who will be an excellent addition to any chambers fortunate enough to gain her as a clerk.

Margaret was one of the very best students I taught in 1L Contracts last year. She not only earned a top score on an extremely competitive exam, she was also wonderfully engaged and thoughtful all semester long. Margaret earned an overall grade of 4.0, the third-highest grade in the class. This score reflected an excellent exam performance across three questions that called for extremely different styles of analysis. It also reflected a perfect participation grade, comprised of stellar in-class oral advocacy, consistent cold-call preparation, and turning in every assignment on time. It is rare to perform so highly across such a range of metrics. Indeed, I design my assessment deliberately to evaluate students along several dimensions to enable differentiation among them and to allow them an opportunity to shine on their individual strengths. Margaret achieved a (rare) excellent and sustained multi-dimensional performance across many metrics over several months.

In class and in office hours, Margaret deftly grasped a complex set of materials, engaging deeply with the readings, impressively drawing connections across disparate concepts, and extrapolating doctrinal learnings from class to real-world lawyering examples. Margaret also played a key role in the section, asking relevant questions that helped clarify the material not only for herself but also for her classmates. Doing so in a classroom of fifty students takes a degree of confidence, bravery, and humility that is rare among 1Ls, but which Margaret accomplished with skill and grace.

Margaret is also uniquely thoughtful and mature. She is the first in her family to attend law school and has a wisdom beyond her years. Margaret excels at breaking down complex ideas into understandable terms (experience that will be immensely valuable to bench briefs). She is also deeply personally committed to diversifying the practice of law and making it as accessible as possible to historically under-represented groups.

Margaret already has significant exposure to both civil and criminal practice, beyond the norm for a second-year law student. She has done impressive work at the County Prosecutor's Office in Spokane, Washington, and at Legal Aid of North Carolina, working on three big co-defendant trials and arguing multiple evidentiary motions. By the end of her time at Legal Aid, Margaret was responsible for her own client, ultimately negotiating, drafting, and executing a consent order with Spanish-speaking parties to resolve the case. She has worked across rural and urban counties and received exposure to various judges across a spectrum of practices and ideologies.

Margaret is deeply and admirably involved in extracurricular activities. She is the Managing Editor of the Duke Journal of Constitutional Law & Public Policy (DJCLPP), has participated in mock trial for two years, and has served on the moot court board almost her entire time at Duke Law. Margaret recently published an impressive piece in on the court's role in Article III. She is a skilled and persuasive writer and is hard at work on other scholarly projects. She has also worked to expand the accessibility of moot court, including starting a suit donation program for Duke Law students who do not otherwise have suits to participate, and she has expanded the diversity, equity, and inclusion training for the organization.

Margaret is also simply a wonderful person. She has an infectious positive energy, kind spirit, and radiating warmth. She is also delightfully well-rounded. For as many substantive conversations as we have had about contract law doctrine, her writing endeavors, and the practice of law, we have also discussed the sociological and psychological ramifications of reality television (Survivor and the Bachelor are fascinating in this arena!), our shared love of Major League Baseball and March Madness, the joy of Jeopardy, and her designation as the best German language student in the entire state of Washington during sophomore year of high school.

At the end of their first year, I asked every student to share an anonymous positive reflection on another student in the section. Margaret's peers (accurately) remarked on her warmth, her kindness, and her generosity in sharing her time and materials to help others understand challenging content. They described her "warm presence that immediately puts everyone at ease," and her "sense of self beyond her years." One student described Margaret as "truly one of the most genuine people I've ever met." I could not agree more with these assessments. They reflect Margaret's intelligence, generosity, and maturity, as well as her grounded presence. She is not only a wonderful student and institutional citizen, but also a highly regarded friend and classmate.

Emilie Aguirre - aguirre@law.duke.edu - 919-613-7200

Margaret Kruzner will excel as a clerk. I offer her my highest recommendation. Please not hesitate to contact me if I can offer any additional information in support of Margaret's candidacy.

Very best,

Emilie Aguirre
Associate Professor of Law

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Margaret Kruzner

Dear Judge Walker:

I am writing to encourage you to hire Margaret Kruzner as a law clerk. I think highly of her, and I think she will be a very good clerk.

Maggie did something a bit bold in spring 2022: she took my Administrative Law class in her first year. This is a new option at Duke (my spring 2022 offering of the class was the first time that first-year students had been allowed to take it), and few first-year students took it – the vast majority of the students in the class were second- and third-year students. To be blunt, it was fairly clear to me who the first-year students were: having had only one semester of law school, they did not have the same level of understanding and knowledge that the upper-level students did. Maggie was an exception. I call on students randomly and accept some volunteers, and I found that Maggie's comments in both situations were careful and insightful. She consistently demonstrated that she had reflected on the materials and thought through their implications. She evinced the analytical abilities that are characteristic of good lawyers and good law clerks – seeing and understanding the big picture while retaining a keen grasp of the details. I was unsurprised to see that her exam was very strong.

Maggie is the first person in her family to attend law school, but she has quickly and ably adjusted to the arguably strange world of law school. She does not get flustered. She works her way carefully and methodically through legal issues while bringing her considerable analytical skills to bear.

On the personal side, she is very engaging and personable. She takes ideas seriously but does not take herself too seriously. She is an unusually sincere person who has really impressive analytic abilities. She sees both sides of an argument and articulates her positions carefully without being arrogant or unpleasant. She demonstrates good judgment and is friendly even when she disagrees with others. I think she will fit in well in just about any chambers.

I clerked on two different courts and have known many clerks and judges over the years, and I believe I have a sense of the qualities that make for a good law clerk. Maggie has those qualities. She will be a very strong clerk.

Sincerely,

Stuart M. Benjamin
William Van Alstyne Professor of Law

Stuart M. Benjamin - Benjamin@law.duke.edu - (919) 613-7275

**MARGARET KRUZNER**
Durham, NC | margaret.kruzner@duke.edu | (206) 910-7554

# WRITING SAMPLE:
# DEFENDANT'S BRIEF IN RE DUTY TO PRESERVE

I drafted the attached writing sample as an assignment in my second semester Legal Analysis, Research, and Writing course in 2022. The assignment required drafting a trial brief analyzing when a party's duty to preserve evidence arises. I conducted all of the research necessary for the assignment. I received general feedback on this sample from my professor, but all edits are my own. Below is a brief description of the relevant facts:

The client, Underground Screenprinting Company, is a t-shirt manufacturer. In February of 2021, a competitor, Market Textiles, approached Underground to create a joint venture. Underground accepted Market's offer, and the companies combined their clientele and manufacturing operations. But the companies' excitement over the partnership was short lived, and soon, operations stalled and indebted the companies. Market sued Underground for the debt incurred on October 19, 2021, and Underground filed a counterclaim shortly thereafter.

During discovery, Market requested documents from Underground that Underground destroyed pursuant to its Network Use Policy. This brief argues that Underground had no duty to preserve documents until it received Market's Complaint on October 19, 2021.

## INTRODUCTION

In February 2021, Underground Screenprinting Co. (Underground) and Market Textiles, Inc. (Plaintiff) entered a joint venture to weave, sew, and embellish t-shirts for high profile clients. Though both companies entered the partnership with experience in the industry, Plaintiff had difficulty manufacturing the t-shirts necessary for the project's orders. These problems led to costly back-charges from clients and left Underground and Plaintiff reeling to salvage the parties' enterprise. Then, Plaintiff unexpectedly commenced the present action. Because Underground did not know about these proceedings and could not reasonably foresee them prior to Plaintiff's filing, Underground's duty to preserve evidence arose when Plaintiff filed its Complaint on October 19, 2021.

## FACTS

Before working with Plaintiff, Underground fulfilled monthly orders of over two million t-shirts to high-profile clients such as Nike. (Countercl. ¶ 7). To manage its operations, Underground implemented a Network Use Policy in March 2020. (Morales Aff. ¶ 4). The Policy, created by Underground's technology specialist, automatically deleted all employee emails after ninety days. *Id.* ¶¶ 3, 5.

In early 2021, Underground saw an opportunity to grow its business when Plaintiff, a major supplier of t-shirts to Fruit of the Loom, expressed interest in partnering with and eventually acquiring Underground. (Countercl. ¶¶ 10, 12). In

February 2021, the companies designed and entered a joint venture. (Countercl. ¶ 13). Underground sold its fabric-making operations to Plaintiff, who would weave and sew blank t-shirts for Underground. *Id.* Then, Underground would complete the screen-printing, packaging, and shipping required to fulfill client orders. *Id.*

From the beginning of the venture, Plaintiff had difficulty manufacturing the number of shirts necessary to fulfill Underground's large orders. (Countercl. ¶ 21). The shirts Plaintiff did manufacture were often defective (Countercl. ¶ 24) or contained the wrong size distributions for Underground's orders (Countercl. ¶ 19). Consequently, Underground had trouble fulfilling the orders. (Countercl. ¶ 23). Underground's clients began to back-charge Underground for delays and quality issues stemming from Plaintiff's manufacturing errors. (Countercl. ¶¶ 23–24). When Underground forwarded these charges to Plaintiff, Plaintiff refused to reimburse Underground. *Id.*

Underground sought to correct Plaintiff's manufacturing difficulties to restimulate normal profits. (Countercl. ¶ 16). To help Plaintiff, Underground relocated several employees to better train Plaintiff's in the manufacturing process. *Id.* In July 2021, Underground offered yarn ordering and operational assistance to Plaintiff at a management meeting. (Bezos Email, July 28, 2021). Underground was confident that these steps would improve the companies' production after

Plaintiff reassured Underground and their clients that Plaintiff's manufacturing performance would improve. (Countercl. ¶¶ 25–26).

In late July, Underground's President received an email from Plaintiff's CEO addressing the debt at issue. (Bezos Email, July 28, 2021). Plaintiff was friendly, opening the message with "[g]reat to see you." *Id.* Though Plaintiff informed Underground that it needed to be paid, Plaintiff recognized that the parties would "start exploring other options" if Underground could not reimburse Plaintiff. *Id.* Underground assured Plaintiff that it was doing its best to comply with Plaintiff's requests. (McIntyre Email, July 28, 2021).

In August 2021, Plaintiff approached Underground with its acquisition offer. (Countercl. ¶ 28). Though Underground rejected this offer, the companies remained in a partnership. *Id.* The following month, Plaintiff's CEO sent another email to Underground's President, acknowledging that both companies were "working [their] tails off to salvage" the partnership. (Bezos Email, Sept. 1, 2021). Plaintiff told Underground that it had to "come through on this one," and that "[t]he time is now, friend." *Id.* Then, on October 19, 2021, Plaintiff filed its Complaint against Underground. (Compl.). That same day, Underground retained counsel and filed its Counterclaim. (Morales Aff. ¶ 8). Counsel instructed Underground to pause its Network Use Policy immediately, and Underground

faithfully complied. *Id.* Since receiving Plaintiff's Complaint, Underground has retained all documents relevant to these proceedings. *Id.*

ARGUMENT

**Underground's duty to preserve evidence arose on October 19, 2021, because Underground did not know about, nor should have foreseen, this suit prior to Plaintiff's Complaint.**

Underground's duty to preserve evidence began on October 19, 2021, when Plaintiff filed its Complaint. "In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit." *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007). A party is not under a duty to preserve until it "knows or should know that certain evidence is relevant to pending or future litigation." *Surowiec v. Cap. Title Agency, Inc.*, 790 F.Supp.2d 997, 1005 (D. Ariz. 2011). In determining whether a party knew of or should have foreseen litigation, "the court's decision must be guided by the facts of each case." *Cache*, 244 F.R.D. at 621.

Underground's contacts with Plaintiff demonstrate that Underground neither knew of, nor should have foreseen, Plaintiff's filing. First, Underground's lack of preparedness for litigation indicates that it had no knowledge that it would be involved in any legal proceedings with Plaintiff. Second, the nature of the parties' communications and business relationship prior to Plaintiff's filing render these proceedings unforeseeable to a reasonable party in Underground's position.

Accordingly, Underground's duty to preserve began with Plaintiff's filing on October 19, 2021.

*A. Underground's duty to preserve began on October 19, 2021 because Underground had no knowledge of this suit before Plaintiff's filing.*

Underground's lack of litigation preparation prior to October 19, 2021 demonstrates that it had no knowledge of this suit prior to Plaintiff's Complaint. Even without explicit evidence of a party's knowledge, a party's behavior before filing can reveal that it foresaw litigation to place it under an advance preservation duty. *See Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1131, 1321 (Fed. Cir. 2011) (holding that a party knew about litigation after it articulated a timeframe and "a motive for implementation of [its] litigation strategy."). For example, the court may infer that a party who seeks legal advice about its relationship with a potential adversary has knowledge of imminent litigation prior to filing. *See Surowiec*, 790 F.Supp.2d at 1006. By contrast, a party's adherence to its normal business practices does not indicate knowledge of litigation. *Micron*, 645 F.3d at 1319–20.

A party who takes "several steps in furtherance of litigation" prior to filing likely knows about litigation. *Id.* at 1323. In *Micron*, the defendant created a litigation strategy by identifying potential defendants and drafting claim charts before filing suit. *Id.* It also created a new document elimination policy, whereby employees would retain helpful documents and participate in "shredding part[ies]" to destroy unhelpful documents before it filed suit. *Id.* at 1324.

Here, Underground's total lack of preparation for suit before October 19, 2021 demonstrates that it had no knowledge of litigation prior to Plaintiff's Complaint. Throughout its relationship with Plaintiff, Underground never sought legal advice. Underground did not even retain legal counsel until it was served with Plaintiff's Complaint. Unlike the *Micron* defendant, Underground did not map potential claims or create a litigation strategy prior to Plaintiff's Complaint.

Moreover, Underground created its Network Use Policy in May 2020, nearly a year before its partnership with Plaintiff. Underground's Policy was not created by an attorney, but rather by its technology specialist to manage its large operations. Underground's routine compliance to its Policy in the days leading up to Plaintiff's Complaint demonstrates its adherence to normal business practices. This usage is entirely dissimilar to the *Micron* defendant's "shredding part[ies]," conducted specifically to prepare for litigation. 645 F.3d at 1324. Accordingly, Underground's behavior demonstrates that it had no knowledge of this suit before Plaintiff's Complaint.

*B. Underground's duty to preserve began when Plaintiff filed its Complaint because a reasonable party in Underground's circumstances would not have foreseen litigation earlier.*

Underground had no duty to preserve prior to this suit's filing because none of its contacts with Plaintiff rendered litigation reasonably foreseeable. A duty to preserve prior to filing arises only when a "reasonable party in the same factual

circumstances would have reasonably foreseen litigation." *Micron*, 645 F.3d at 1320. Though litigation need not be "imminent" for a reasonable party to foresee it, the "mere existence of a potential claim or the distant possibility of litigation" does not impose an early duty to preserve. *Id.* Determining whether litigation is foreseeable is an "objective" and "fact-specific" inquiry centered around the parties' contacts with one another. *Id.* Here, Plaintiff and Underground's communications and business relationship strongly support that a reasonable party in Underground's circumstances would not have foreseen litigation prior to Plaintiff's Complaint.

*1. The parties' communications render litigation unforeseeable to a reasonable party in Underground's position.*

Plaintiff's communications with Underground would not cause a reasonable party in Underground's position to foresee litigation prior to Plaintiff's Complaint. If any duty to preserve exists before filing, it "must be predicated on something more than an equivocal statement of discontent." *Cache*, 244 F.R.D. at 623. For example, a party that receives a "letter openly threaten[ing] litigation" has a duty to preserve evidence upon receipt of the letter. *Surowiec*, 790 F.Supp.2d at 1006. By contrast, a pre-filing communication that simply seeks "a business remedy for perceived business wrongdoing" does not render litigation foreseeable. *Cache*, 244 F.R.D. at 622. Similarly, communication that implies "willing[ness] to explore a negotiated resolution" does not automatically create an early duty to preserve. *Id.*

Even messages from an adversary's attorney regarding a legal dispute may not place a party under an early duty to preserve. *See Cache,* 244 F.R.D. at 622. For example, in *Cache,* the court recognized that litigation was unforeseeable prior to filing even after plaintiff's counsel informed defendant of a patent dispute. *Id.* In *Cache,* plaintiff's counsel called to inform defendant of its potential infringement of plaintiff's patent. *Id.* Shortly thereafter, plaintiff's counsel sent a letter to defendant to inquire if their conflict could be "resolved without litigation." *Id.* The following year, plaintiff's counsel reiterated that plaintiff would be open to non-legal resolutions of the dispute. *Id.* Then, two years after its initial call, plaintiff filed suit. *Id.* In recognizing that the defendant's duty to preserve began with plaintiff's filing, the court reasoned that the communications "must be more explicit and less equivocal" to impose an earlier preservation duty. *Id.* at 623.

Here, Plaintiff's communication with Underground about the debt in dispute can only be characterized as "equivocal statement[s] of discontent." *Id.* Plaintiff first mentioned finances to Underground in late July 2021. After Underground assured Plaintiff that it was working on payment, Plaintiff offered to acquire Underground and sent encouraging remarks. Plaintiff's only other mention of Underground's debt came two months later, when Plaintiff ambiguously suggested that Underground must "come through on this one." (Bezos Email, Sept. 1, 2021).

Litigation was significantly less foreseeable to Underground than to the defendants in *Cache*. While the *Cache* defendant received communications from the plaintiff's attorney discussing litigation as a possibility, Underground merely received emails from Plaintiff's CEO regarding a debt Underground was openly discussing and actively working with Plaintiff to repay. Plaintiff even suggested that the parties would "explor[e] other options" to settle Underground's debt (Bezos Email, July 28, 2021), implying Plaintiff's willingness to explore a "negotiated resolution," or a "business remedy for a perceived business wrongdoing." *Cache*, 244 F.R.D. at 622. Because Plaintiff's communications were equivocal and never placed Underground on explicit notice of litigation, litigation was unforeseeable and Underground had no duty to preserve prior to filing.

*2. A reasonable party in Underground's position would not foresee litigation based on the parties' business relationship.*

Plaintiff's congenial relationship with Underground further indicates that litigation was unforeseeable. "When parties have a business relationship that is mutually beneficial and that ultimately turns sour . . . litigation [is] less foreseeable." *Micron*, 645 F.3d at 1325. By contrast, litigation is more foreseeable when it occurs between parties who are "naturally adversarial." *Id.*

Here, Underground's venture with Plaintiff was created to be mutually beneficial. Both parties were primary suppliers to major companies such as Fruit of the Loom and Nike. As such, their planned acquisition would have eliminated

market competition in the t-shirt niche. Throughout the parties' relationship, Underground sent employees to help Plaintiff with manufacturing and assisted Plaintiff at management meetings. Plaintiff itself maintained the parties' affable relationship by assuring Underground on several occasions that its performance would improve. In August 2021, Plaintiff offered to acquire Underground, suggesting that the parties' initial relationship was unchanged by Underground's debt. Even after Underground rejected Plaintiff's offer, Plaintiff elected to remain in a partnership with Underground.

Beyond the structure of their relationship, the parties' communication further supports that Plaintiff and Underground's relationship was non-adversarial. Plaintiff's CEO regarded Underground's President as his "friend" and acknowledged that both companies were "working their tails off" to create a lucrative venture. (Bezos Email, Sept. 1, 2021). Accordingly, the parties' business relationship rendered litigation unforeseeable to a reasonable party in Underground's circumstances prior to filing, creating no advance duty to preserve.

## CONCLUSION

Because Underground did not know of and should not have reasonably foreseen litigation before Plaintiff's Complaint was filed, this Court should find that Underground's duty to preserve arose on October 19, 2021.

## Applicant Details

| | |
|---|---|
| First Name | **Carlos** |
| Middle Initial | **A.** |
| Last Name | **Larrauri** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **larrauri@umich.edu** |
| Address | **Address**<br>Street<br>**9818 SW 94th Terrace**<br>City<br>**Miami**<br>State/Territory<br>**Florida**<br>Zip<br>**33176** |
| Contact Phone Number | **(305) 510-9196** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **New College of Florida** |
| Date of BA/BS | **May 2011** |
| JD/LLB From | **The University of Michigan Law School**<br>**http://www.law.umich.edu/currentstudents/careerservices** |
| Date of JD/LLB | **May 3, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Michigan Law Review** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Professional Organization

Organizations **Just the Beginning Organization**

## Recommenders

Chopp, Debra
dchopp@umich.edu
734-763-1948
Stein, Michael
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617-495-1726
Mendlow, Gabriel
mendlow@umich.edu
734-764-9337
Price, Nicholson
wnp@umich.edu
734-763-8509

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year law student at the University of Michigan Law School and a Zuckerman Fellow at Harvard's Center for Public Leadership, where I am pursuing a concurrent master in public administration at the Harvard Kennedy School of Government. I am writing to apply for a clerkship in your chambers for the 2024–2025 term. A clerkship in your chambers will offer me unparalleled preparation for a career in public service as a healthcare rights advocate.

Having practiced for five years as a dual board-certified family nurse practitioner and psychiatric mental health nurse practitioner, I have seen firsthand how the legal system can hinder or facilitate positive change, underscoring the vital importance of compassionate, thoughtful decision-making. Nonetheless, to develop greater literacy in the legal system and the tools needed for systemic advocacy, I decided to build upon my clinical training and pursue legal and policy education.

Furthermore, my work across academia and policymaking has allowed me to hone my written and oral advocacy, research diligence, and ability to collaborate with others. In addition to serving as a Senior Editor of the *Michigan Law Review*, I have assisted professors at both Harvard and Michigan with research leading to publishable scholarship, including a current chapter for an American Psychiatric Association clinical textbook, a publication in *World Psychiatry*, and other projects.

While my substantive focus has been on the intersection of mental health, law, and policy, I am ready to broaden my understanding of various legal areas, gain valuable insights into judicial decision-making, and hone my legal writing and argument construction skills. I believe your guidance and mentorship would be invaluable in my personal and professional growth as an attorney, and I would be eager to contribute and continue developing these skills and insights as a clerk in your chambers.

I have attached my resume, transcripts, and writing sample(s) for your review. Letters of recommendation from the following professors are also attached:

- Professor Michael Ashley Stein: mastein@law.harvard.edu, (617) 495-1726
- Professor William Nicholson Price II: wnp@umich.edu, (734) 763-8509
- Professor Debra Chopp: dchopp@umich.edu, (734) 763-1948
- Professor Gabriel Mendlow: mendlow@umich.edu, (734) 764-9337

Thank you for your time and consideration.

Respectfully,

Carlos A. Larrauri